NOTES

BLASPHEMY

INTRODUCTION

> The English common law, according to Blackstone, punished
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> *blasphemy* against the Almighty, by denying his being or providence; or by contumelious reproaches of our saviour Christ. Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule. . . . [F]or Christianity is part of the laws of England.[1]

Pre- and post-constitutional United States saw the development of laws emulating their English antecedents.[2] Though such laws would seem to have no place in a nation whose Constitution guarantees the separation of church and state, the Judaeo-Christian tradition has unquestionably been one of the sources of American morals, ethics, and law.[3] The letter of the Constitution does not resolve this anomaly. A rule of law does not automatically violate the first amendment's prohibition of an establishment of religion merely because it comports with precepts of the western religions, just as a statute which prohibits a practice of a minority religion does not necessarily violate the free exercise clause.[4] Nor does a law punishing speech or press always violate the first amendment.[5]

Though current constitutional standards indeed raise doubts about the continuing validity of convictions for blasphemy under these three Bill of Rights provisions, no federal court, or high state court has held the punishment of blasphemy unconstitutional. This is perhaps due to a lack of litigation; the last reported decision before this year was in 1921.[6] Although no case is

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1. 4 W. BLACKSTONE, COMMENTARIES *59.

2. *See* text accompanying notes 64-122 *infra*. This paragraph from Blackstone, or words to similar effect, are the sources of much American common and statutory law. *E.g.*, State v. Chandler, 2 Del. 553 (Ct. Gen. Sess. 1837); People v. Ruggles, 8 Johns. 290 (N.Y. 1811); MASS. ANN. LAWS ch. 272, § 36 (1968). The following statutes in force in the United States punish blasphemy in various forms: CONN. GEN. STAT. REV. § 53-242 (1968) (repealed 1969, effective Oct. 1, 1971. Public Act No. 828, §§ 214-15, [1969] Conn. Public Acts 1618); DEL. CODE ANN. tit. 11, § 801 (1953); ME. REV. STAT. ANN. tit. 17, § 451 (1964); MD. ANN. CODE art. 27, § 20 (1967); MASS. ANN. LAWS ch. 272, § 36 (1968); MICH. COMP. LAWS ANN. § 750.102 (1968); NEB. REV. STAT. § 28-936 (1964) (penalty: fine of $0.25 to $1.00); N.H. REV. STAT. ANN. § 578:1 (1955); N.J. REV. STAT. § 2A:140-2 (1951); N.D. CENT. CODE § 12-21-01 to 02 (1960); OHIO REV. CODE ANN. § 2923.16 (Baldwin 1964); OKLA. STAT. ANN. tit. 21, § 901-02 (1958); PA. STAT. tit. 18, § 4523 (1963); R.I. GEN. LAWS ANN. § 11-11-6 (1956); S.D. COMP. LAWS § 22-13-8 (1967); VT. STAT. ANN. tit. 13, § 801 (1958).

3. *E.g.*, Zorach v. Clauson, 343 U.S. 306, 313 (1952) (released time religious instruction off school property upheld).

4. *E.g.*, Reynolds v. United States, 98 U.S. 145 (1879) (plural marriage).

5. *E.g.*, Roth v. United States, 354 U.S. 476 (1957) (obscenity).

6. State v. Mockus, 120 Me. 84, 113 A. 39 (1921).

now pending in an appellate court, a recently affirmed 1969 decision in a county court in Maryland indicates that the issue may again become the subject of constitutional litigation. In *West v. Campbell*,[7] petitioner was convicted of blasphemy in lieu of a more traditional disorderly conduct or profanity conviction,[8] for telling a policeman who was arresting him for being drunk and disorderly to "[t]ake your God damn hands off me."[9] The state claimed that blasphemy was a secular offense, a rule so taken for granted that it has made its way into *American Jurisprudence*.[10] Nevertheless, the judge repudiated it, finding that the law gave unwarranted protection to the sensibilities of Christians despite the claim that such language might lead to a breach of the peace. He examined the English and American cases, and the Maryland law, at great length, and concluded that the first amendment prohibited their application today. That the offense was defined in terms as an offense against religion could not be denied; it seemed specious to the Maryland court to call it secular merely because Christianity is the de facto choice of the majority.

It is apparent from the basis of this court's opinion that a constitutional analysis of blasphemy must begin with both the secular and religious justifications historically advanced for their existence. The policies which history shows to underlie blasphemy laws may determine whether in either the religious or secular sphere there is presently sufficient governmental interest in such laws to justify their retention in light of current constitutional standards. Extensive discussion of this historical background should reveal whether anything can be said to remain of the crime of blasphemy, or whether *West v. Campbell* more accurately represents the state of the law today.

I. English Historical Development

The English law up to Blackstone's time had punished, with varying degrees of severity, at least nine different religious offenses,[11] with the ecclesiastical courts a principal forum until 1640. In that year, however, most of their

7. No. 2814 Crim. (Cir. Ct. Carroll County Md., May 1, 1969), *aff'd sub nom.* State v. West, — Md. App. —, 263 A.2d 602 (Ct. Spec. App. 1970).

Another current episode involving blasphemy occurred when a high school "underground" newspaper in Delaware published a short story in which Jesus Christ was called a bastard. N.Y. Times, May 29, 1969, at 41, col. 1. A prosecution for blasphemy was instituted, and dropped several months later, the state's attorney saying that he did not think such publications could be suppressed consistently with religious freedom. N.Y. Times, Oct. 1, 1969, at 26, col. 1.

8. *See* text accompanying notes 182-95 *infra*. *Cf.* Commonwealth v. Brown, 67 Pa. D. & C. 151 (C.P. Franklin County 1948), where the words "The God damn son of a bitch ought to fall down and break her neck" were held not blasphemous.

9. Letter from Judge Edward O. Weant, Jr., to Jess G. Schiffmann, May 28, 1969, on file at the Columbia Law Review.

10. 12 Am. Jur. 2d *Blasphemy & Profanity* § 1 (1964).

11. 4 W. Blackstone, Commentaries *43 et seq. *See generally* T. Schroeder, Constitutional Free Speech Defined and Defended in an Unfinished Argument in a Case of Blasphemy 179 et seq. (1919); 2 J. Fitzjames Stephen, A History of the Criminal Law of England 396 et seq. (1883).

secular coercive power was removed by statute.[12] While this statute was partially repealed in 1661,[13] and most of the ecclesiastical courts' power over the broad range of religious crimes restored, in practice their secular power was moribund, and they exacted only the more spiritual sanctions of penance and excommunication.[14] At the same time that Parliament reaffirmed the power of these courts to use "Ecclesiastical Censures" in 1676, their power to inflict capital punishment was formally removed.[15] The statute implies that for religious offenses, the death sentence could not be imposed by secular courts either; in fact, Parliament's displeasure at the laxity of strictures in this area led to "An Act for the more effectual suppressing of Blasphemy and Profaneness" in 1698.[16] Technically this was an act against apostasy, as it only punished un-Christian acts and expressions by one who had been brought up as a Christian or who had at one time professed to believe in it.[17] There were few, if any, prosecutions under this statute,[18] however, so that by Blackstone's time the first two of his religious offenses—apostasy and heresy—were dead letters.

Blackstone divided the third religious offense into two parts: (1) reviling the established church, and (2) non-conformity.[19] The first, after a period of severe enforcement corresponding to the punishment of heresy and apostasy, was used at the end of the eighteenth century mostly to punish public "railing" against the Church of England and arousing "contumely and contempt" for it.[20] The crime of non-conformity involved total failure to observe Protestant ritual; guilty parties, usually either dissenters or "papists," were ineligible for public office and incurred other civil disabilities. There is evidence that these penalties were falling into disuse;[21] in any case, Blackstone claimed, they were justified as protection of the secular government, because Roman Catholics "acknowledge a foreign power, superior to the sovereignty of the kingdom . . . ."[22]

The fourth offense Blackstone treated was blasphemy, which he introduced as follows:

> Thus much for offences, which strike at our national religion, or the doctrine and discipline of the church of England in particular. I proceed now to consider some gross impieties and general immoralities, which are taken notice of and punished by our municipal law; frequently in concurrence with the ecclesiastical, . . . though with a view

12. 16 Car. 1, c. 11 (1640).
13. 13 Car. 2, c. 12 (1661).
14. 2 J. FITZJAMES STEPHEN, *supra* note 11, at 428-29.
15. 29 Car. 2, c. 9 (1676).
16. 9 & 10 Will. 3, c. 32 (1698).
17. *Id. See also* 4 W. BLACKSTONE, COMMENTARIES *43.
18. 234 PARL. DEB., H.C. (5th ser.) 496 (1930); 2 J. FITZJAMES STEPHEN, *supra* note 11, at 469.
19. 4 W. BLACKSTONE, COMMENTARIES *50-52.
20. *Id.* at *51.
21. *Id.* at *57.
22. *Id.* at *55.

> somewhat different: the spiritual court punishing all sinful enormities for the sake of reforming the private sinner, *pro salute animae*; while the temporal courts resent the public affront to religion and morality on which all government must depend for support, and correct more for the sake of example than private amendment.
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> The fourth species of offences, therefore, more immediately against God and religion, is that of *blasphemy* . . . .[23]

Blackstone's transition from the previous offenses to blasphemy is important in analyzing the more generalized rationales upon which this crime might arguably be based. The implication is that blasphemy is punished not to protect the established church as such, but to protect an interest arising out of the position of Christianity as a de facto source of Western ethics generally, a distinction that has important consequences in an American constitutional analysis. The nature of this interest is not clear, but there are several possibilities: the state may wish to suppress the spread of ideas considered subversive of established moral and ethical standards; the public may not wish to be exposed to that which it finds grossly offensive; or the state may wish to avoid provoking its citizens to breaches of the peace. These considerations underlie, at least verbally, the few blasphemy cases that exist, though often it is impossible to tell which one really controlled the outcome. In the framework of current American constitutional law, however, the nature and force of the state interest may be crucial in determining whether a statute justifiably infringes a first amendment freedom. Blackstone's treatment suggests at least that blasphemy was not an establishment of religion as it was known at the time of the adoption of the Bill of Rights. This interpretation is strengthened by the offenses following blasphemy in this "public affront" category of religious crimes, some of which would not be considered at all religious today: "profane and common *swearing* and *cursing*";[24] "*witchcraft, conjuration, inchantment*, or *sorcery*,"[25] whose primary evil was that they were fraudulent; "religious imposters," who, like blasphemers, subjected Christianity to "ridicule and contempt";[26] simony (the unlawful sale of religious offices); sabbath-breaking; public drunkenness; and "open and notorious *lewdness*: either by frequenting houses of ill fame, which is an indictable offense; or by some grossly scandalous and public indecency . . . ."[27]

The cases cited by Blackstone for his comment on blasphemy support his view, but they suggest as well that in a modern frame of reference, his "public affront" analysis does not render the offense entirely secular. In *Taylor's Case*,[28] perhaps the strongest early expression of common-law power over the offense of blasphemy, the defendant was convicted in King's Bench for saying

23. *Id.* at *59.
24. *Id.*
25. *Id.* at *60-62.
26. *Id.* at *62.
27. *Id.* at *62-64.
28. 86 Eng. Rep. 189 (K.B. 1676).

"that Jesus Christ was a bastard, a whoremaster, religion was a cheat; and that he [Taylor] neither feared God, the devil, or man."[29] Chief Justice Hale stated the relationship between Christianity and civil order:

> [S]uch kind of wicked blasphemous words [are] not only an offence to God and religion, but a crime against the laws, State and Government, and therefore punishable in this Court. For to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and . . . Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.[30]

In 1729, in *Rex v. Woolston*,[31] the same court considered it beyond any doubt that "to write against Christianity in general was . . . an offence punishable in the Temporal Courts at common law . . . ."[32]

The underlying rationale of *Taylor's Case* is not entirely clear. It is probably not that immediate disorder will be the result of blasphemy, but rather that the fabric of society itself is weakened by mockery or questioning of the foundations of law, one of which is the Christian religion. The English seem peculiarly attached to the notion that the individual and his innermost thoughts are part of the bonds holding society together, and that society may therefore act to prevent, as far as possible, external influences from leading those thoughts from the established path.[33] If for the moment that position is assumed to be justified, it follows that in a society whose morality is derived from Christianity, the punishment of blasphemy may be a reasonable means of achieving that goal. In that context, the aim would be secular, and distinct, as Blackstone said, from efforts narrowly aimed at protecting the established church, even though today, the underlying assumption might be termed religious.

In Blackstone's time blasphemy law had indiscriminately covered both drunken ravings[34] and serious intellectual (and often political) efforts.[35] The nineteenth century saw an attempt, more striking on its face than as applied, to exclude the latter category from the operation of the rule. Although there are earlier cases, a particularly strong statement was made before the House of Lords in 1842, in *Shore v. Wilson*.[36] Justice Erskine said:

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29. *Id.*
30. *Id.*
31. 93 Eng. Rep. 881 (K.B. 1729).
32. *Id.* at 881-82. Even this early court recognized that the rule did not cover all criticism of religion: "They [the judges] desired it might be taken notice of, that they laid their stress upon the word general, and did not intend to include disputes between learned men upon particular controverted points." *Id.* at 882.
33. *See* P. DEVLIN, THE ENFORCEMENT OF MORALS 9-14, *passim* (1965).
34. *E.g.*, Rex v. Sidley, 82 Eng. Rep. 1036 (K.B. 1663).
35. *E.g.*, Rex v. Williams, 26 Howell's St. Tr. 653 (K.B. 1797) (prosecution for publishing Thomas Paine's *Age of Reason*). This was true despite claims to the contrary. *See* note 32 *supra*.
36. 8 Eng. Rep. 450 (H.L. 1842).

> It is indeed still blasphemy, punishable at common law, scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith, . . . yet any man may, without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it.[37]

This desire to limit the crime, however, was more apparent than real. There was clearly a requirement of intent to insult or ridicule Christianity, but the impact of this rule was diminished by allowing the jury to infer intent from the face of a publication, and by the presumption, albeit rebuttable, that one intends the natural consequences of his acts.[38] In any case, a Christian jury would no doubt use its own subjective judgment and condemn what it found offensive. A rule of law based on the manner in which an author deals with an otherwise permissible subject is susceptible to vague and capricious application, especially in the emotionally charged area of religion. Furthermore there is conceptual difficulty in applying the expressed rationale of preserving the bonds of society if persuasive but inoffensive arguments are to be permitted, while mere vilification, which probably would not lessen any true believer's devotion, is to be punished. This development, however, can be viewed as merely an outgrowth of changing times. As the Middle Ages became history, a growing body of respectable opinion was persuasive enough to make some room in the law for rational inquiry into matters of faith. The continued existence of the bonds of society in reasonably good repair, despite diverse moral and religious beliefs, no doubt facilitated this development, and probably enabled the societal interest to continue as a viable justification for the existence of blasphemy laws.

It was apparently more difficult to sympathize with those who appeared not to take their dissent with the utmost seriousness, however, and even into the twentieth century there was little room in the English law for satirical or mocking exposition of the vagaries of Christian belief. For that matter, despite the ostensible protection given to serious debate on religious subjects, in practice such debate was still often suppressed. In *Regina v. Ramsay*,[39] a case involving the magazine *The Freethinker*, Lord Coleridge reaffirmed the earlier developments of the century, saying that "if the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy."[40] He also said that the core of the offense was the actual insult and shock to believers, as the result of a willful and malicious intent to corrupt, pervert, or mislead them.[41] This case received con-

37. *Id.* at 517.
38. *See, e.g.*, The King v. Creevey, 105 Eng. Rep. 102 (K.B. 1813) (libel); The King v. Harvey, 107 Eng. Rep. 379 (K.B. 1823) (libel).
39. 15 Cox Crim. Cas. 231 (Q.B. 1883).
40. *Id.* at 238.
41. *Id.* at 236.

siderable publicity, and the prosecution was eventually dropped.[42] In two cases involving the Christmas, 1882 issue of the same publication, however, the defendants were convicted.[43] Thus, despite liberalizing trends, no clear distinctions were actually made. The most notable throwback to the Blackstonian era was *Cowan v. Milbourn*,[44] in which a contract to let a hall for the purpose of giving lectures on "the Character and Teachings of Christ; the former Defective, the latter Misleading," and "The Bible shewn to be no more Inspired than any other Book"[45] was held unenforceable because for an unlawful purpose, implying that a lecture on these topics might be sufficient for criminal prosecution. The ground for refusing enforcement must have been the nature of the subject matter itself, since the manner in which it would be discussed could hardly be foretold. This issue was raised again in 1917 in *Bowman v. Secular Society, Ltd.*,[46] which upheld a gift to an organization formed to advocate the disestablishment of the Church of England, and "[t]o promote . . . the principle that human conduct should be based upon natural knowledge, and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action."[47] Although these aims were admittedly anti-Christian, the court held that the organization did not have a criminal purpose, *i.e.*, the propagation of blasphemy.[48] *Cowan v. Milbourn* was strongly disapproved of and effectively overruled, but the judges re-emphasized that the "decencies of controversy" must be observed in dealing with Christianity. Thus, although the decision has been taken as an extremely liberal statement on blasphemy, its factual setting and its reiteration of Christianity's protected position prevent it from standing as a significant safeguard for anti-Christian expression.

Given the fact that *Bowman* upheld the contract involved and in view of the relatively small number of blasphemy prosecutions between 1883 and 1917, the law may have appeared to be a dead letter. That there was some vitality left in this area was shown by *The King v. Gott*,[49] which affirmed a conviction for publishing a pamphlet mocking Christ's arrival in Jerusalem. This, however, was apparently England's last blasphemy prosecution. The subject was resuscitated, for the last significant time, by the introduction of the Blasphemy Laws (Amendment) Bill in the House of Commons in November, 1929.[50]

42. *Id.* at 239 n.(a).
43. G. NOKES, A HISTORY OF THE CRIME OF BLASPHEMY 93 & n.x (1928).
44. L.R. 2 Ex. 230 (1867), *disapproved in* Bowman v. Secular Society, Ltd., [1917] A.C. 406.
45. L.R. 2 Ex. at 231.
46. [1917] A.C. 406, *noted in* Lee, *The Law of Blasphemy*, 16 MICH. L. REV. 149 (1918). *See also* Note, *The Legality of Atheism*, 31 HARV. L. REV. 289 (1917).
47. [1917] A.C. at 407.
48. *Id.* at 451-52. The Supreme Court of the United States reached a similar result in Vidal v. Girard's Executors, 43 U.S. (2 How.) 126, 198-99 (1844).
49. 16 Crim. App. 87 (1922).
50. 231 PARL. DEB., H.C. (5th ser.) 618 (1929). *See generally* R. POLLARD, ABOLISH THE BLASPHEMY LAWS (1957).

The Bill, which would effectively have nullified the common-law crime of blasphemy, was withdrawn when it appeared that it would not pass as drafted,[51] but the extensive debates concerning it[52] are perhaps the clearest manifestation of the range of rationales that conceivably underlie and fortify the law in this area. There were undertones of concern for protecting social inferiors from corrupting material which they would be unable to judge properly,[53] a sort of *noblesse oblige* which was not foreign to Blackstone.[54] A passionate concern for the welfare of children was also expressed in Parliament.[55] The rationale which emerges most clearly, however, was the offense to religious sensibilities occasioned by the vile blasphemer. As one member put it, "You have no idea how horrible, scurrilous, venomous and filthy have been the utterances of men who, during the past hundred years, have been prosecuted for offences of blasphemy,"[56] and he referred to Gott[57] as "a most venomous and foul-mouthed person in his attacks on Christianity."[58] As this suggests, the line between blasphemy and obscenity was at times thin, at least in the minds of some beholders. Another Member felt that one evil result of the Amendment Bill would be that "cartoons and articles and views which are merely lascivious and indecent . . . will be licensed."[59] The xenophobia traditionally thought to be typical of the puritan mentality was expressed by Sir Charles Oman: "In England, thank God! we are free from the disgusting exhibition which I perpetually see in Continental newspapers—caricatures of the most sacred things used not merely for comment but as lecherous and disgusting perversions."[60]

As a corollary to the offense to religious sensibilities, there was always the assumption that a religious insult might lead to a breach of the peace by the hearer. After the second reading of the Amendment Bill, government opposition forces proposed an amendment to read:

> Any person who . . . publishes any matter of so scurrilous a character as to be calculated, by outraging the religious convictions of any other person, to provoke a breach of the peace shall be guilty of an offence under the Act.[61]

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51. 169 L. TIMES 186 (1930).
52. 234 PARL. DEB., H.C. (5th ser.) 495-575 (1930).
53. *Id.* at 537, 565-66. *See also* 169 L. TIMES 125 (1930).
54. Of the sabbath he had said: "It humanizes, by the help of conversation and society, the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit." 4 W. BLACKSTONE, COMMENTARIES *63.
55. 234 PARL. DEB., H.C. (5th ser) 537-38, 540 (1930). In the United States, the same concern justifies protecting children from much sexual material, Ginsberg v. New York, 390 U.S. 629 (1968), but it cannot justify suppressing it entirely, Butler v. Michigan, 352 U.S. 380 (1957).
56. 234 PARL. DEB., H.C. (5th ser.) 522 (1930).
57. *See* text accompanying note 49 *supra.*
58. 234 PARL. DEB., H.C. (5th ser.) 523 (1930).
59. *Id.* at 532.
60. *Id.* at 509.
61. 169 L. TIMES 186 (1930).

This proposal was unacceptable to the promoter of the Bill, and the Bill was withdrawn.[62] The government amendment, however, embodies this additional rationale which under appropriate circumstances may require consideration of legitimate governmental interests even under the American concept of free speech.[63] The writings that were punished as blasphemy in the last century would be most unlikely to provoke a breach of the peace now, however, and the apparent absence of prosecutions for blasphemy since 1922 no doubt reflects English society's tacit acceptance of communications offensive or insulting to Protestant Christianity.

English history provides no single determinative rationale for blasphemy laws. Nevertheless, the cases illustrate reliance on almost every conceivable principle. The fact that in 1929 members of Parliament were still of different opinions as to its most relevant justification indicates that perhaps the English were searching for the most expedient support when enforcement was desired, rather than trying to gear enforcement to achieving the desired objective. One thing is clear, the separation of religious and secular foundations of decision is difficult with respect to the English experience because of the political establishment of the Church of England. Such a relationship was alien to the United States; theoretically the justifications offered for blasphemy laws in the American decisions should illustrate a more consistent philosophical approach.

II. History of Blasphemy in the United States

Despite the absence of religious establishment in the United States, the American development of blasphemy law, and its corresponding rationales, followed the English experience fairly closely. The first amendment, in particular, was no stricture, since it was not considered binding on the states by way of the fourteenth until after most blasphemy cases were decided.[64] The states were bound by their own constitutions, of course, and these usually contained professions of religious freedom more expansive than anything the English had enjoyed; but as will be seen, the American courts, like the English, considered that blasphemy was no part of justifiable expression or religious discussion. If it accounted for any differences, the tradition evidenced by the first amendment may have increased the law's sensitivity to clearly religious rationales; nevertheless, the American decisions evidence considerations which today would be termed nonsecular.

The experience of New York in this area was the earliest, and it set the tone for future blasphemy jurisprudence. In *People v. Ruggles*,[65] the defen-

62. *Id.*

63. *E.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). *But cf.* Cantwell v. Connecticut, 310 U.S. 296 (1940).

64. Gitlow v. New York, 268 U.S. 652 (1925).

65. 8 Johns. 290 (N.Y. 1811). For background commentary and criticism see

dant was convicted on a common-law blasphemy indictment for speaking the words, "*Jesus Christ* was a bastard, and his mother must be a whore."[66] Chief Justice Kent, writing for the New York Supreme Court (then the state's highest law court) affirmed, holding that the above words spoken with a malicious disposition were not protected by New York's constitutional guarantee of religious freedom,[67] and that punishment of them did not violate the guarantee of separation of church and state.[68] His reasoning, too, was traditional. Blasphemy was a specific threat to the existing secular order because it weakened the force of oaths;[69] the words "are punishable because they strike at the root of moral obligation, and weaken the security of the social ties."[70] The de facto position of Christianity as the predominant religion was merely another aspect of the moral tone which, as Lord Devlin still argues,[71] society has a right to preserve. As in England, in this respect, blasphemy is on the same level as obscenity: "Things which corrupt moral sentiment, as obscene actions, prints and writings, and even gross instances of seduction, have, upon the same principle, been held indictable . . . ."[72] There are, on the other hand, expressions in Kent's opinion which, even accepting these assumptions, would seem to allow Christianity too large a sphere of influence. In regard to the effect of blasphemous words on the administration of an oath he said, "they tend to lessen, in the public mind, its religious sanction."[73] "[T]he case assumes that we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity, and not upon the doctrines of worship of those impostors [Mahomet and the Grand Llama]."[74] Thus while claiming to emphasize the secular offense involved, Kent clearly intimates the favored position of Christianity in the law.

The *Ruggles* decision ignited considerable debate in 1821, when a convention was called to revise the New York State Constitution.[75] The opponents of the decision proposed a section which read, "The judiciary shall not declare any particular religion to be the law of the land; nor exclude any witness on

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J. HORTON, JAMES KENT, A STUDY IN CONSERVATISM 1763-1847, at 191-93 (1939); T. SCHROEDER, *supra* note 11, at 46-71.

66. *Id. Cf.* People v. Porter, 2 Park. Crim. Cas. 14 (N.Y. Ct. Oyer & Terminer 1823) ("God Almighty is a whoremaster, the Virgin Mary a damned whore, and Jesus Christ a bastard."); Jared W. Bell's Case, 6 N.Y. City Hall Recorder 38 (Ct. Gen. Sess. 1821) ("God Almighty was a damn'd fool [and] Jesus Christ was a damned fool . . . for creating such men as composed the Hartford Convention.").

67. "[T]he liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state." N.Y. CONST. art. 38 (1777). The present provision is N.Y. CONST. art. 1, § 3.

68. 8 Johns. at 296.

69. *Id.* at 297.

70. *Id.* at 296.

71. P. DEVLIN, *supra* note 33, at 9-14, *passim*.

72. 8 Johns. at 294-95.

73. *Id.* at 297.

74. *Id.* at 294-95.

75. REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, at 462-65, 574-77 (N. Carter & W. Stone ed. 1821) [hereinafter cited as 1821 PROCEEDINGS].

account of his religious faith."[76] The first clause was apparently an attack on Kent's reliance on the English law, as laid down by Blackstone, which seemed to declare Christianity to be the law of the land.[77] The second clause was presumably intended to undermine the argument that blasphemy weakened the force of oaths.[78] Though neither provision was adopted, the proposals quite clearly manifest the tension created by the broader religious overtones in the *Ruggles* opinion.

Ruggles and the debates of 1821 were cited in the next blasphemy case, *Updegraph v. Commonwealth*,[79] which indicates the application of blasphemy laws to more intellectual varieties of speech. The defendant was a member of a debating club, and during a debate on a religious question before an apparently limited, off-the-street audience, he said in substance:

> [t]hat the Holy Scriptures were a mere fable; [t]hat they were a contradiction, and that, although they contained a number of good things, yet they contained a great many lies.[80]

A jury found him guilty under a still extant blasphemy statute[81] which was misinterpreted on appeal to require an allegation in the indictment of "profanely" speaking, causing a reversal of the conviction. The court's opinion illustrates the peculiar mixture of secularism and religion relied on in many of the decisions; it particularly emphasized the belief that if the state did not punish blasphemy, offended people would.[82] In addition, general moral restraints would be weakened and anarchy would result.[83] Yet the court frankly admitted that "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania . . . ,"[84] thus perpetuating one of Blackstone's more unfortunate, and frequently misunderstood, catch phrases.[85]

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76. *Id.* at 462.

77. *See* text accompanying note 1 *supra*; Taylor's Case, 86 Eng. Rep. 189 (K.B. 1676).

78. Kent spoke eloquently in defense of the Ruggles opinion, reiterating the secular nature of the offense and his claim that no establishment of religion was involved. In the speeches of others on the oath provision, however, Christianity's preferred position was quite blatant. A Colonel Young said, "The testimony of the atheist and infidel, ought not to be placed upon an equality with others, as he could feel no responsibility." 1821 PROCEEDINGS at 465. Dr. Rufus King, of Queens County, said:

> According to the Christian system, men pass into a future state of existence, when the deeds of their life become the subject of rewards or punishment—the moral law rests upon the truth of this doctrine, without which it has no sufficient sanction.

Id. at 575. Kent uttered words to the same effect. *Id.* at 464. The abolition of the religious test for witnesses has since been adopted, however. N.Y. CONST. art. 1, § 3.

79. 11 S. & R. 394 (Pa. 1824).

80. *Id.*

81. Law of November 27, 1700, ch. 44, § 3, 2 Pa. Statutes at Large 50, *as amended*, PA. STAT. tit. 18, § 4523 (1963):

> Whosoever shall willfully, premeditatedly and despitefully blaspheme or speak loosely and profanely of Almighty God, Christ, Jesus, the Holy Spirit or the Scriptures of Truth, and is legally convicted thereof . . . .

82. 11 S. & R. at 405.

83. *Id.* at 406.

84. *Id.* at 400.

85. *See* text accompanying note 1 *supra*.

Although the court, like Chief Justice Kent in *Ruggles*, claimed to be talking about historical fact rather than a legal establishment of religion, such phrases serve only to blur the distinction. Finally, the judge took the opportunity of a reversal to excoriate the defendant's conduct with particular vehemence. He not only accepted the jury verdict as at least a finding of fact that the defendant's acts had been done with all the malice stated in the indictment (and statute) but for the fatal omission; he went further, and offered the view that words with the substance alleged in the indictment[86] could not possibly have been uttered with any serious argumentative intent.[87] The judge obviously abhorred the content of the speech, despite his professions to the contrary. The danger is that if a judge can effectively say that certain words, or even the substance of ideas, are vituperative as a matter of law, the protection offered by the requirement of a malicious intent to vilify or insult is nugatory, as it was in England.

The facts in *State v. Chandler*[88] were more like the usual blasphemy case than those in *Updegraph*. The defendant said loudly, in public, "the virgin Mary was a whore, and Jesus Christ was a bastard." Though Delaware punished blasphemy by statute,[89] the term was not defined; thus common-law interpretations controlled. The court reasoned in particularly clear terms that the protection of certain religious values served secular objectives:

> [The common law] adapted itself to the religion of the country just so far as was necessary for the peace and safety of civil institutions; but it took cognizance of offences against God only, when by their inevitable effects they became offences against man and his temporal security.[90]

The necessary *mens rea* for blasphemy was clearly defined; by requiring malicious intent, the court professed to exclude the "author or preacher who fairly and conscientiously promulgates the opinions with whose truth he is impressed."[91]

Although the facts of the case do not suggest that the defendant was being satirical, the court indicated that "offensive levity," with respect to religious subjects, was malicious[92] and thus at least as noxious as "railing" or vituperation. This implication is present in the English case of *The King v. Gott*[93] discussed above,[94] and of several later American cases.[95] Although like

86. *See* text accompanying note 80 *supra*.
87. 11 S. & R. at 399.
88. 2 Del. 553 (Ct. Gen. Sess. 1837).
89. DEL. CODE ANN. tit. 11, § 801 (1953).
90. 2 Del. at 557.
91. *Id.* at 564, *citing* T. STARKIE, A TREATISE ON THE LAW OF SLANDER 444 (1st Amer. ed. 1826). Virtually identical language appears in Updegraph v. Commonwealth, 11 S. & R. 394, 405-06 (Pa. 1824).
92. 2 Del. at 564.
93. 16 Crim. App. 87 (1922).
94. *See* text accompanying note 49 *supra*.
95. *E.g.*, State v. Mockus, 120 Me. 84, 113 A.39 (1921). *See* Annot., 14 A.L.R. 880

much of blasphemy law this seems incompatible with mid-twentieth-century standards, it is perfectly consistent with the assumption that God's authority must be preserved for the sake of the secular order. Satire, laughter, and ridicule all tend to undermine that authority. The irony is, of course, that rational discourse may be just as undermining, and yet the law claims to protect it. As *Updegraph* shows, however, the practical resolution of this apparent conflict was that language or circumstances which had every appearance of reasonable discussion could in fact be held to have the malicious intent required for blasphemy. In at least one respect, however, the *Chandler* court made a progressive observation, one that might have particular relevance in assessing the validity of the law today. It recognized that, although the state might always punish words subversive of the public order, the application of this principle would change with society, or if the judges' fears of anarchy as the result of certain words proved unfounded.[96]

The Massachusetts case of *Commonwealth v. Kneeland*[97] is, along with *Ruggles*, the most famous blasphemy case of the period, partly because the opinion was written by the noted Chief Justice Lemuel Shaw. It is similar to *Updegraph* in that it shows dramatically that blasphemy laws could suppress more serious criticism despite judicial protestations to the contrary. Abner Kneeland described himself in his argument *pro se* as "not an atheist, but a pantheist."[98] In his newspaper, the *Boston Investigator*, he published the following language, which formed the basis of his indictment:

> 1. Universalists believe in a god which I do not; but believe that their god, with all his moral attributes (aside from nature itself) is nothing more than a mere chimera of their own imagination.
> 2. Universalists believe in Christ, which I do not; but believe that the whole story concerning him is as much a fable and a fiction as that of the god Prometheus, the tragedy of whose death is said to have been acted on the stage in the theatre at Athens, five hundred years before the Christian era.
> 3. Universalists believe in miracles, which I do not; but believe that every pretension to them can be accounted for on natural principles, or else is to be attributed to mere trick and imposture.
> 4. Universalists believe in the resurrection of the dead, in immortality and eternal life, which I do not; but believe that all life is mortal, that death is an eternal extinction of life to the individual who possesses it, and that no individual life is, ever was, or ever will be eternal.[99]

(1921). *See* text accompanying note 108 *infra*. *See also* the accounts of the prosecution of Anthony Bimba in Massachusetts, *infra* note 113 and accompanying text.

96. 2 Del. at 571-72.

97. 37 Mass. (20 Pick.) 206 (1838). For background commentary and criticism see Z. CHAFEE, THE INQUIRING MIND 113-14 (1928); L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 43-58 (1957); T. SCHROEDER, *supra* note 11, at 72-88; Commager, *The Blasphemy of Abner Kneeland*, 8 N.E.Q., March 1935, at 29.

98. 37 Mass. (20 Pick.) at 209.

99. *Id.* at 207.

Kneeland was convicted under a Massachusetts statute, largely derived from Blackstone,[100] punishing "[w]hoever wilfully blasphemes . . . ."[101] Kneeland's statements were no doubt hard for many pious Universalists to take. Massachusetts in 1838, however, was not a place where established beliefs went unchallenged. Perhaps this very fact, that Kneeland was not a harmless aberration but a small part of a major challenge to the status quo, led the Supreme Judicial Court to treat him severely. The court, from its point of view, was reacting to a genuine societal danger, even though on its surface the decision appeared to be tolerant enough of diverse opinions. The court construed the word "wilfully" to require proof of a "bad purpose," an unjustifiable intent to calumniate Christianity, and the court felt bound by the jury's apparent determination that Kneeland's conduct had been willful. This is of course the same requirement that many of the English and American cases had found. Like other judges, Shaw saw blasphemy as a disturbance of the public peace, and therefore as a neutral, secular offense. Nevertheless, like many before him, he revealed the ingrown prejudices of his era and social background. "Wilful" denial of God, he said, was "denial with the injurious, unlawful intent, to impair and destroy the veneration due to him, as an intelligent creator, governor and final judge of the world . . . ."[102] As has been suggested above in the discussion of *Updegraph*,[103] such attempts at formulating principles of presumptive willfulness may indeed counterbalance the neutrality requirement. As Professor Chafee said:

> It seems clear today [1928] that such a delicate judicial investigation into the mind of the speaker is liable to be swayed by the attitude of the judge or jury on the doctrines expressed. A man with bad views is easily conceived to have a bad purpose.[104]

Eighty years elapsed between the *Kneeland* decision and the next, and last, blasphemy case to reach a high state court. *State v. Mockus*[105] was a 1921 Maine decision, and the reasoning of the case straightforwardly followed *Kneeland* in the face of legal and constitutional challenges. The case had some political overtones, and perhaps foreshadowed the possible relevance of blasphemy today. Mockus was a Lithuanian and apparently a socialist. In a speech in his native language he made the now-familiar derogation of the virginity

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100. *Cf.* text accompanying note 1 *supra.*
101. MASS. ANN. LAWS ch. 272, § 36 (1968):
Whoever wilfully blasphemes the holy name of God by denying, cursing or contumeliously reproaching God, his creation, government or final judging of the world, or by cursing or contumeliously reproaching Jesus Christ or the Holy Ghost, or by cursing or contumeliously reproaching or exposing to contempt and ridicule, the holy word of God contained in the holy scriptures [shall be fined and/or imprisoned].
102. 37 Mass. (20 Pick.) at 225.
103. *See* text following note 87 *supra.*
104. Z. CHAFEE, *supra* note 97, at 113.
105. 120 Me. 84, 113 A. 39 (1921).

and legitimacy of Christ's birth, and perhaps more important, he made such statements as: "Religion, capitalism and government are all damned humbugs, liars and thieves. . . . All religions are a deception of the people. . . . There is no truth in the Bible, it is only monkey business. Religion, capitalism and government are a black army and only profiteer from the poor people."[106]

The Maine blasphemy statute is almost identical to that of Massachusetts, except that it does not contain the word "wilfully."[107] What is striking about the case, aside from its recentness, is its explicit emphasis on the part of the statute relating to "contempt and ridicule." Although at least one Lithuanian must have been shocked enough to complain to the police and translate Mockus's speech, the court looked to that part of the record which showed that the audience laughed and applauded at his remarks,[108] and considered this sufficient to sustain the conviction. Since, strictly speaking, the circumstances did not involve an overt offense to the community at large, the court was clearly protecting an ostensible community interest in the private beliefs of even (or especially) the willing audience. The reliance on ridicule precludes breach of the peace as a viable rationale, perhaps making explicit what had remained below the surface in *Updegraph* and *Kneeland.*

Subsequent to 1921 Massachusetts saw several unsuccessful attempts at applying the law upheld in *Kneeland,* though none are officially reported. It is significant that at least two prosecutions were the direct result of the same sort of fierce political and social tensions which surrounded, and beclouded, the prosecution of Sacco and Vanzetti. For that matter Mockus himself (he had also been prosecuted in Illinois and Connecticut) was no doubt a relatively fortunate victim of the "Red scare" during the years after World War I.

In one of the Massachusetts cases Dr. Horace Meyer Kallen, the literary executor of Williams James's estate and a founder of the New School for Social Research, addressed a rally in behalf of Sacco and Vanzetti as follows: "If Sacco and Vanzetti were anarchists, so were Jesus Christ, Socrates and others."[109] A warrant for his arrest on a charge of blasphemy was issued, but later withdrawn.[110] The most celebrated case of the period was factually similar to *Mockus.* Anthony Bimba was the editor of a Lithuanian language Communist newspaper published in Brooklyn. In January, 1926, he addressed a group of Lithuanians in their native tongue in Brockton, Massachusetts. The primary purpose of the meeting, apparently, was to protest the toleration by the clerical government then ruling in Lithuania of the torture of political prisoners,[111] and during the course of his speech Bimba said (as translated and alleged by the prosecution):

106. *Id.* at 88, 113 A. at 40-41.
107. ME. REV. STAT. ANN. tit. 17, § 451 (1964). *Cf.* MASS. ANN. LAWS ch. 272, § 36 (1968); note 101, *supra.*
108. 120 Me. at 98, 113 A. at 45.
109. N.Y. Times, Aug. 28, 1928, at 26, col. 3.
110. N.Y. Times, Aug. 29, 1928, at 8, col. 1.
111. N.Y. Times, Feb. 27, 1926, at 3, col. 1; N.Y. Times, Mar. 3, 1926, at 25, col. 4.

> People have built churches for the last 2000 years, and we have sweated under Christian rule for 2000 years. And what have we got? The Government is in the control of the priests and bishops, clerics and capitalists. They tell us there is a God. Where is He?
>
> There is no such thing. Who can prove it? There are still fools enough who believe in God. The priests tell us there is a soul. Why, I have a sole, but that sole is on my shoe. Referring to Christ, the priests also tell us He is a God. Why, He is no more a God than you or I. He was just a plain man.[112]

As in *Mockus*, there was substantial evidence that the audience had laughed in response.[113] Bimba was charged with both blasphemy[114] and making seditious utterances, the latter charge apparently stemming from implications that he was urging revolution and the replacement of the existing government with one like that of the Soviet Union.[115] In a bench trial he was acquitted of blasphemy, the judge apparently accepting his claim that he was criticizing Lithuanian politics rather than Christianity:

> I don't hold that his statements as to his personal religion played any particular part, nor that it was intended to persuade any among his audience to become atheists. I am content to leave it that he declared his personal belief in a way allowed under the Kneeland decision.[116]

Bimba was convicted of sedition, however, although the sentence was only a $100 fine because, according to the judge, the nation was not at war and the influence of radicals was declining.[117] Bimba appealed and the prosecution, for unexplained reasons, dropped the case at that point.[118]

The printed word, even on a less political level, did not escape the Massachusetts blasphemy law in the 1920's. In 1927 one Warren W. Williams was prosecuted for authoring *The Great Secret of Freemasonry*, in which Christ's morality was impugned. Williams was sentenced to six months in jail by the District Court in Suffolk County, but on appeal to the Superior Court a jury failed to reach a verdict and he was released.[119]

As a sociological phenomenon these 1920's prosecutions, coming as they did between long periods of apparently lax enforcement, can be seen as a last gasp by an older, complacent order facing the complex challenges of increasing urbanization and diversity of intellectual outlook. In Boston and New York, the circulation of modern literature was severely hampered by the New England Watch and Ward Society and the New York Society for the Suppression of Vice.[120] Much of the concern of these groups was for the morality

112. N.Y. Times, Feb. 19, 1926, at 3, col. 5.
113. N.Y. Times, Feb. 26, 1926, at 3, col. 1.
114. MASS. ANN. LAWS ch. 272, § 36 (1968).
115. N.Y. Times, Feb. 19, 1926, at 3, col. 5.
116. N.Y. Times, Mar. 3, 1926, at 25, col. 4.
117. *Id.*
118. Z. CHAFEE, *supra* note 97, at 108 n.1. *See generally id.* at 108-16, *and* various issues of the New York Times from Feb. 18-Mar. 3, 1926.
119. Z. CHAFEE, *supra* note 97, at 114 n.8; N.Y. Times, June 15, 1927, at 6, col. 4. The defendant's name was rendered as Warner M. Williams by the *Times*.
120. *See generally* Grant & Angoff, *Massachusetts and Censorship* (pts. 1-2), 10

of the lower classes who, if sufficiently corrupted, might threaten the tranquillity of upper class existence. The passage of prohibition, too, reflected this concern. In the 1930's and since, of course, the power of the Watch and Ward Society has vanished, prohibition has been repealed, and the blasphemy laws have been virtually unenforced. Though first amendment developments have made it increasingly difficult to restrict political speech under the guise of, for example, obscenity, much of society still finds deviance from established moral patterns highly offensive. Though suppression of political speech was probably not the motive of Maryland in 1968 for prosecuting West,[121] the most recent blasphemy defendant, the possible vitality of existing statutes cannot be discounted; indeed the court, by its decision in that case, at least recognized the inherent potential for danger. Few other American cases had ever before struck down blasphemy laws as constitutionally impermissible; none are reported, and none come from a state court of last resort. One such holding emerged from a Kentucky trial court in 1894 on the ground that the original purpose of blasphemy laws was to uphold the established church and not to maintain good order.[122] Whatever inconsequential law there is on the constitutionality of blasphemy laws, including *West*, is thus apparently based on their tendency towards establishment of religion. An historical analysis of both English and American jurisprudence suggests that any constitutional examination of blasphemy laws must deal not only with the religious overtones, but with the variety of secular objectives which, at least verbally, have provided these laws with their most substantial justification. Secular justifications cannot, of course, be taken wholly at face value; as has been shown, purely religious factors have often played a dominant role. Nevertheless, it must be recognized that possible future uses of blasphemy laws may indeed be aimed at "protecting" precisely those secular interests which earlier decisions had assumed to be sufficient. Constitutional law now demands, then, consideration of all plausible underpinnings, religious and secular.

III. Blasphemy Laws and the Constitution

Whichever of the relevant rationales is emphasized, a constitutional analysis of blasphemy laws will inevitably involve three provisions of the first

B.U.L. Rev. 36, 147 (1930); Grant & Angoff, *Recent Developments in Censorship*, 10 B.U.L. Rev. 488 (1930).

121. West v. Campbell, No. 2814 Crim. (Cir. Ct. Carroll County Md., May 1, 1969), *aff'd sub nom.* State v. West, — Md. App. —, 263 A.2d 602 (Ct. Spec. App. 1970). *See* text accompanying notes 7-10 *supra*.

122. T. Schroeder, *supra* note 11, at 60-64. The defendant was indicted for publishing the following words:

> When I say that Jesus Christ was a man exactly like I am, and had a human father and mother exactly like I had, some of the pious call it blasphemy. When they say that Jesus Christ was born as the result of a sort of Breckinridge-Pollard hyphenation between God and a Jew women, I call it blasphemy, so you see there is a stand-off.

Id. at 60. Schroeder reports a case with a similar result involving Michael X. Mockus, the defendant in the Maine blasphemy case, in an Illinois county court. *Id.* at 451 et seq.

amendment: the establishment clause, the free exercise clause, and the free speech clause, all made applicable to the states by virtue of the due process clause of the fourteenth amendment.[123] Although in some respects the analysis of each provision is dependent upon analysis of another, the effect of each provision can, at least at the outset, be assessed independently.

A. *Establishment of Religion*

Laws which, although they do not apparently restrict the freedom of an individual in any way, place a particular religious belief in a preferred position before the law may violate the first amendment's prohibition of an establishment of religion. Although not literally a freedom, the clause has been held to be a part of the rights guaranteed by the first amendment, and protected from infringement by the states through the fourteenth amendment.[124] At the same time it decided this, however, the Supreme Court in *Everson v. Board of Education*[125] upheld a state's reimbursement of parents for their children's transportation costs to parochial schools, and set forth the rule that a secular, neutral purpose and general public interest would justify what otherwise would appear to aid a religion. As formulated in a much later decision on school prayer, the requirements were "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[126] Such rulings in the area of education recognize the obvious fact that parochial schools remove from the state some of the burden of educating its children, and thus deserve some compensation.

Illustrative of the "secular purpose" doctrine, and perhaps the most obvious parallel to blasphemy laws, are the Sunday Closing Law cases, specifically *McGowan v. Maryland*[127] and *Two Guys from Harrison-Allentown, Inc. v. McGinley*,[128] which unlike *Everson* involve significant interference with individual freedom. In these cases, particularly *McGowan*, the Supreme Court acknowledged the patently Christian origins of Sunday as a day of rest,[129] yet upheld the state's right to require any or all businesses to close on Sunday. Essentially the Court's rationale was that the purpose of such laws today is not to legislate any special encouragement of religious worship, but merely to provide a uniform day of rest and quiet for the general welfare, and that

123. Gitlow v. New York, 268 U.S. 652, 666 (1925) (dictum) (free speech); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (free exercise); Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (establishment).

124. Everson v. Board of Educ., 330 U.S. 1 (1947). *See also* School Dist. v. Schempp, 374 U.S. 203, 256 (1963) (concurring opinion of Brennan, J.); McCollum v. Board of Educ., 333 U.S. 203 (1948).

125. 330 U.S. 1 (1947). *See also* Board of Educ. v. Allen, 392 U.S. 236 (1968) (state loan of textbooks to parochial schools held constitutional).

126. School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

127. 366 U.S. 420 (1961).

128. 366 U.S. 582 (1961).

129 *Id.* at 431.

Sunday as a choice need not be rejected merely because most Americans would prefer that day as a result of their religious upbringing.

The similarities to blasphemy are obvious: thus if the primary legislative purpose of blasphemy laws is to protect people from what is grossly offensive, which is at least arguable from a historical viewpoint,[130] it may not necessarily establish a religion to define the offense in religious terms. If the rationale of the early cases that attacks on the prevailing religion are per se dangerous to society is accepted, the "secular purpose" justification is even more persuasive. In today's context, however, this societal danger is a factual assumption which is open to question. Lord Sumner was able to say, in England in 1917:

> The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. . . . In the present day reasonable men do not apprehend the dissolution or the downfall of society because religion is publicly assailed by methods not scandalous.[131]

Furthermore, the public and legislative interest in a day of rest presumably exists regardless of the religion of those for whom this benefit was intended,[132] whereas if the state punishes language whose content is defined in religious terms, it is clear that protection is being afforded only to those whose religious sensibilities are grossly offended. Thus, not only is religion the basis for a particular legislative judgment that could have been made in any case, but it is also the determinative factor as to whose interests are being protected; the suppression of the language merely diminishes a Christian's fears that others will be corrupted. For both of these reasons, the "secular purpose" doctrine advanced in *Everson* and elucidated in the Sunday Closing Law cases cannot justify blasphemy laws.

Even where there is no "secular purpose" the Court has tolerated governmental action with respect to religion where its effect on religion was seen as neutral or de minimis. *Zorach v. Clauson*[133] upheld a program in which school children were allowed to leave the school grounds during the day for religious instruction; Mr. Justice Douglas, for the majority, stressed that the schools were merely making "adjustments of their schedules to accommodate the religious needs of the people."[134] And in a phrase more than slightly reminiscent of Chief Justice Kent in *People v. Ruggles*,[135] Douglas declared that "[w]e

130. *See* text accompanying notes 41, 56-60, 92, 108 *supra*.
131. Bowman v. Secular Society, Ltd., [1917] A.C. 406, 466-67.
132. *See* Arlan's Dep't Store v. Kentucky, 371 U.S. 218 (1962), where in a memorandum decision dismissing an appeal for want of a substantial federal question (Justice Douglas vigorously dissenting), the Court let stand a statute requiring businesses to close one day a week, in which the day did not have to be Sunday.
133. 343 U.S. 306 (1952).
134. *Id.* at 315.
135. 8 Johns. 290 (N.Y. 1811).

are a religious people whose institutions presuppose a Supreme Being."[136] To strike down this legislation, he felt, would require "that the government show a callous indifference to religious groups . . . be hostile to religion and . . . throw its weight against efforts to widen the effective scope of religious influence."[137] The facts of an earlier case striking down a released time program, *McCollum v. Board of Education*,[138] were distinguished on the grounds that "the classrooms were used for religious instruction and the force of the public school was used to promote that instruction."[139]

Certainly Douglas's phraseology, if not the principle in its entirety, can be criticized.[140] Even accepting the general statement, however, the Court's application of the theory to the facts of *Zorach* is not compelling, as the dissenting opinions of Justices Black, Frankfurter, and Jackson indicate. In *Zorach*, students who did not take religious instruction had to remain in school, which put the same effective state "force" or coercion behind the instruction as there had been in *McCollum*.[141] Confinement to school grounds was certainly not a neutral treatment of those who observed no religion, since they were not free to do as they wished during time when others were released for religious purposes. As Mr. Justice Frankfurter said, "[t]here is all the difference in the world between letting the children out of school and letting some of them out of school into religious classes."[142]

The neutrality or de minimis principle supports blasphemy laws even less than it supports the *Zorach* result. On its face, such a law is not neutral, if it protects only religious sensibilities, and thus gives believers a special protection not available to non-Christians. The Supreme Court expounded on the evil effects of such governmental favoritism in *Engel v. Vitale*,[143] the first school prayer case:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. . . . [T]he purposes underlying the Establishment Clause go much further than [prohibiting coercion of minorities]. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. . . . Another purpose of the Establishment Clause rested

136. 343 U.S. at 313.
137. *Id.* at 314.
138. 333 U.S. 203 (1948).
139. 343 U.S. at 315.
140. *E.g.*, Address by Professor Sidney Hook, Proceedings of the Annual Judicial Conference of the Tenth Judicial Circuit of the United States, in 34 F.R.D. 29, 77 (1963): "That we are a religious people is an historical or sociological fact. That our institutions presuppose the existence of a Supreme Being is demonstrably false."
141. 343 U.S. at 323-25 (dissenting opinion of Jackson, J.).
142. *Id.* at 320 (dissenting opinion of Frankfurter, J.).
143. 370 U.S. 421 (1962).

> upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.[144]

The facts behind many of the English and American blasphemy cases suggest that the Court's fears are well-founded and applicable to that area of the law, particularly the fear of persecution of dissenters. In this respect, of course, the line between the domains of the free exercise and establishment clauses is blurred, but it shows "the role of the Establishment Clause as a coguarantor, with the Free Exercise Clause, of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone."[145]

The Court's most recent significant establishment decision provides a close analogy to the problem of the neutrality of a blasphemy law. In *Epperson v. Arkansas*,[146] the Court struck down a state law prohibiting public school teachers from teaching evolution. Despite "[t]he State's undoubted right to prescribe the curriculum for its public schools," a subject could not be forbidden "where that prohibition is based upon reasons that violate the First Amendment."[147] Specifically, the neutrality requirement of the establishment clause was violated: "It is clear that fundamentalist sectarian conviction was and is the law's reason for existence."[148] "Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine . . . ."[149] This "anti-evolution" statute was in effect a species of blasphemy statute, albeit in a narrow context. The similarity was not lost on the Supreme Court:

> "[T]he same ideological considerations underlie the anti-evolution enactment" as underlie the typical blasphemy statute. . . . [T]he purpose of these statutes is an "ideological" one which "involves an effort to prevent (by censorship) or punish the presentation of intellectually significant matter which contradicts accepted social, moral or religious ideas."[150]

This statement in a footnote is not dispositive, of course, of the blasphemy issue; blasphemy statutes have been justified on a whole host of grounds which may or may not be applicable to an anti-evolution statute.[151] The neutrality principle as stated forcefully in the *Epperson* case does seem to foreclose, however, the argument that blasphemy statutes, if supported solely by the rationale of protecting religious sensibilities from offensive verbal affront, can be removed from the prohibition of the establishment clause.

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144. *Id.* at 430-32 (footnotes omitted).
145. School Dist. v. Schempp, 374 U.S. 203, 256 (1963) (concurring opinion of Brennan, J.).
146. 393 U.S. 97 (1968).
147. *Id.* at 107.
148. *Id.* at 107-08 (footnotes omitted).
149. *Id.* at 103.
150. *Id.* at 107-08 n.15, *quoting* Leflar, *Legal Liability for the Exercise of Free Speech*, 10 ARK. L. REV. 155, 158 (1956).
151. *See generally* text accompanying notes 23-122 *supra*.

B. *Free Exercise of Religion*

It is conceivable that both proponents and opponents of blasphemy laws would rely on the free exercise clause to support their contentions. Yet free exercise of religion can affect the analysis of blasphemy in only a peripheral way. Supporters of blasphemy legislation might cite the general fact that in almost every area where a question of religion arises, there is an almost inevitable tension between the establishment and free exercise clauses. For example, in the *Everson* case, the claim was made that reimbursement of parents for their children's transportation costs to parochial schools was an establishment of religion. Yet it could just as credibly be argued that failure to do so, while reimbursing parents of public school children, inhibited the free exercise of the religion practiced by the parochial school children. Other examples of this tension are numerous.[152] In most of these cases, then, examination of an "establishment" issue requires at least implicit consideration of the free exercise problem. This is not true, however, with respect to blasphemy statutes. While it is certainly true that these laws present significant establishment problems, it is indeed difficult to conceive of any argument by which the absence of a blasphemy statute, which punishes language rather than, for example, disruption of church services, would inhibit any free exercise of religion. Thus, the factor that compels consideration of the issue in most cases is not present here, at least where one is discussing free exercise by those other than the alleged blasphemer.

Whether the free exercise clause is relevant to the blasphemer himself in any significant way depends on the nature of the alleged blasphemy—that is, whether it be through speech or conduct. Cases dealing with the special problems of the free exercise clause have involved religious practices rather than speech. Where the Supreme Court has dealt with religious speech,[153] the implication is that the more fully-developed protections and limitations of the free speech clause, rather than those of the more specialized free exercise clause, are applicable.[154] To protect religious speech differently from non-

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152. *See, e.g.*, H. WECHSLER, THE NATIONALIZATION OF CIVIL LIBERTIES AND CIVIL RIGHTS 14 (1968):

> A prison or the army, for example, may provide chaplains to minister to the religious needs of these communities. Is their compensation out of public funds forbidden as "establishment" or would their absence, given the restraints on prisoners and soldiers, be a prohibition of "free exercise"? Is the legislature precluded from making such concessions to religious sensibility as the Selective Service Act purported to accord to persons conscientiously opposed to war in any form by reason of "religious training or belief"? Was the Court right in holding the denial of unemployment compensation to a Sabbatarian, found to be employable except for her unwillingness to work on Saturday, an impairment of free exercise? Or should it rather have considered the denial necessary to avoid a dispensation constituting an establishment? (Footnotes omitted).

153. *E.g.*, Marsh v. Alabama, 326 U.S. 501 (1946); Martin v. Struthers, 319 U.S. 141 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

154. *See* text accompanying notes 171-296 *infra*. Justice Jackson, concurring in Douglas v. Jeannette, 319 U.S. 157, 179 (1943), claimed as well that the *intention* of the

religious speech, after all, might itself be a violation of the neutrality required by the establishment clause. The only relevance of the free exercise clause to blasphemy would be in a case involving conduct alleged to be blasphemous, such as the observance of a Black Mass or various forms of witchcraft. Courts have, of course, dealt with practices claiming this protection which also run strongly against the moral professions or other interests of the majority. Such practices as plural marriage,[155] drug use,[156] abstention from medical treatment,[157] and snake handling,[158] have been regulated despite the claim of interference with the free exercise of religion. The cases stand for a clear rule that the interests of society can justify prohibition of such conduct. The surprising California case of *People v. Woody*,[159] which held that peyotism among Indians as a religious practice could not constitutionally be punished, or the tacit governmental toleration of polygamy among small Mormon sects,[160] reflect not a new juridical concept of freedom of religion, but rather a change in attitude toward the behavior involved in its special context.

The current standards, in a different factual situation, were expounded most recently in *Sherbert v. Verner*,[161] which struck down a law withholding unemployment benefits from a Seventh-day Adventist who refused to work on Saturday. The Court set out an obvious two-pronged test: whether a law actually inhibited the free exercise of religion, and if so whether it was justified by a "compelling state interest."[162] The Court saw a clear burden on a religious practice, even though the withholding of a benefit rather than criminal penalty was involved, and an insufficient state interest, stressing that "no showing merely of a rational relationship to some colorable state interest would suffice . . . ."[163] While apparently increasing the protection due religious practices, the Court probably was only keeping pace with current free speech developments, and requiring mere governmental neutrality. This may in fact be shown by the case of *Braunfeld v. Brown*,[164] in which a Sunday closing law was held to impose only an incidental burden on an Orthodox Jew's observance of the Saturday Sabbath, and therefore justifiable by a minimal, if not purely conjectural, state interest in having all businesses closed on the same day of the week.

Under the two-pronged test of *Verner*, the threshold question is whether

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free exercise clause was to assure religion only as much protection as secular discussion. *See also* Fernandez, *The Free Exercise of Religion*, 36 So. CAL. L. REV. 546 (1963).

155. Reynolds v. United States, 98 U.S. 145 (1879).

156. State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966), *cert. denied*, 386 U.S. 917 (1967).

157. Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination); Jehovah's Witnesses v. King County Hospital, 278 F. Supp. 488 (W.D. Wash. 1967) (three-judge court), *aff'd mem.*, 390 U.S. 598 (1968).

158. Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942).

159. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

160. N.Y. Times, Oct. 12, 1969, § 1, at 5, col. 1.

161. 374 U.S. 398 (1963).

162. *Id.* at 403.

163. *Id.* at 406.

164. 366 U.S. 599 (1961).

blasphemous *conduct* can ever be considered an exercise of religion. In *United States v. Ballard*[165] the Supreme Court perhaps set the tone for such a case by refusing to consider the truth of the religious beliefs motivating defendants' conduct, but allowing the sincerity of their belief to be questioned rigorously. This has proved an effective way for a court to sidestep the issue of free exercise, merely by holding that the actor did not prove that he in fact held a belief as an article of religious faith, for example when the Neo-American Church has sought the right to use hallucinogenic drugs.[166] The Supreme Court seems more likely to assume that an exercise is religious, however, and to require a "compelling state interest" to justify its suppression if necessary, along the lines of *Braunfeld v. Brown*[167] and *Sherbert v. Verner*.[168] Perhaps therefore in the area of blasphemous conduct, the reasoning of the polygamy cases could still prevail, if blasphemy were deemed as offensive as polygamy.

In the area of speech and press the free exercise clause has been held no defense to a prosecution for sending immoral literature through the mail,[169] or even for using obscene speech in a sermon to one's own congregation.[170] These cases are of course consistent with the theory that religious speech is entitled to no more protection than secular speech. It is appropriate, then, to turn to an analysis of blasphemy statutes in the more relevant and significant free speech area.

C. *Free Speech*

Judicial construction of the free speech clause, virtually all of which has occurred since the last significant blasphemy case in 1921,[171] has centered roughly in the two broad areas of political and non-political speech. The earliest and most extensive protection was given the former with the articulation of the "clear and present danger" test by Justice Holmes.[172] The theory was developing that the paramount national interest regarding the first amendment was in preserving peaceful political processes for changing the law.[173] By contrast, "fighting words,"[174] libel,[175] commercial advertising,[176] and ob-

165. 322 U.S. 78 (1944).
166. United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968).
167. 366 U.S. 599 (1961).
168. 374 U.S. 398 (1963).
169. Knowles v. United States, 170 F. 409 (8th Cir. 1909).
170. Delk v. Commonwealth, 166 Ky. 39, 178 S.W. 1129 (1915).
171. State v. Mockus, 120 Me. 84, 113 A. 39 (1921).
172. Schenck v. United States, 249 U.S. 47, 52 (1919). *See also* Fiske v. Kansas, 274 U.S. 380 (1927), in which the Court for the first time reversed a state conviction as violative of the free speech clause, incorporated into the fourteenth amendment.
173. *E.g.*, Near v. Minnesota, 283 U.S. 697 (1931); Stromberg v. California, 283 U.S. 359, 369 (1931). *See also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1 (1942).
174. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
175. Beauharnais v. Illinois, 343 U.S. 250 (1952).
176. Breard v. Alexandria, 341 U.S. 622 (1951); Valentine v. Chrestensen, 316 U.S. 52 (1942).

scenity[177] have been held to be "not within the area of constitutionally protected speech or press,"[178] which means at least that no "clear and present danger" need be proved to render such speech punishable. The initial issue, then, is whether blasphemous speech is of the type to which the rigorous protections of the free speech clause have traditionally been denied.

At first glance, blasphemy would seem to be most akin to this less secure, "second class" speech. Indeed, the historical justification for the non-absolute nature of the first amendment was supported largely by the existence of statutes punishing libel, blasphemy, or profanity in almost all the states in 1792,[179] although if this rationale were carried to its necessary conclusion, political speech might fare considerably less well than it has.[180] Nonetheless, the distinction is firmly entrenched. Merely labelling a particular instance as one of the unprotected forms, however, does not confer a "talismanic immunity" from the first amendment's prohibitions.[181] The very definition of obscenity, or libel, for example, is a constitutional question if the policy of the first amendment is to be effectively implemented.

Historically, blasphemy was closely aligned to other "crimes" that bear some resemblance to obscenity. The offense of profane cursing or swearing was by nature an oral offense, the common-law rule requiring repeated utterances in public in order to be punishable.[182] This requirement was often altered by statute. The common-law rule in the United States also defined the content carefully, as "words importing an imprecation of divine vengeance, or implying divine condemnation."[183] The application of this rule in specific instances is far from clear, however, as three Mississippi cases show. In 1898, that state's supreme court, in its first profanity case, held that the words "You are a damned rascal and a damned liar" were criminal, even though a deity was not mentioned.[184] In the next case, *Sanford v. State*,[185] the court had considerable difficulty distinguishing the previous one as it held "Go to hell, you low-down devils" not profane. The court said:

> There was simply a rude request or order to go to hell, with no necessity to obey, no power to enforce obedience, and no intimation that the irresistible Power had condemned, or was invoked to condemn, them to go to hell.[186]

177. Roth v. United States, 354 U.S. 476 (1957).
178. *Id.* at 485.
179. *Id.* at 482-83 & nn.11-12.
180. There is much evidence that the literal intent of the framers of the first amendment was merely to prohibit prior restraints on speech and press. *E.g.*, L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION 176, 202 *passim* (1963).
181. New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).
182. *Ex parte* Delaney, 43 Cal. 478 (1872) (dictum); State v. Pepper, 68 N.C. 259 (1873) (dictum).
183. State v. Wiley, 76 Miss. 282, 283, 24 So. 194 (1898).
184. *Id.*
185. 91 Miss. 158, 44 So. 801 (1907).
186. *Id.* at 162, 44 So. at 801.

The prosecution's reasoning was much more persuasive: "It is certainly true that no one can consign or condemn individuals to hell save the Deity . . . ."[187] Twenty years later, the same court upheld a conviction for saying, "Well, the damn thing is done broke up."[188]

The two federal court decisions on the subject reflect the same uncertainty, while also redefining the offense in terms of irreverence or disrespect for God. In *Duncan v. United States*[189] the Court of Appeals for the Ninth Circuit upheld a conviction under the Radio Act of 1927:[190]

> [T]he defendant having referred to an individual as "damned," having used the expression "By God" irreverently, and having announced his intention to call down the curse of God upon certain individuals, was properly convicted of using profane language . . . in radio broadcasting.[191]

In 1966 the same court reversed a conviction where a citizen's band operator, in a moment of anger, said "God damn it" on the air.[192]

The relationship between this crime and blasphemy is unclear, and perhaps depends on the idiosyncrasies of the jurisdiction; there are certainly not enough cases to lay down a hard and fast rule. Blasphemy laws have been applied to what appears to be mere swearing, in Maryland[193] and Connecticut,[194] for example. In Pennsylvania, on the other hand, the words "[t]he God damn son of a bitch ought to fall down and break her neck" have been held not to violate the blasphemy law.[195] Blasphemy is certainly the broader offense, since it operates where ideas or mode of expression are offensive even where the language does not fall into a narrowly defined category.

The similarity between blasphemy and obscenity as we know it today was pointed out by the Supreme Court even when the Court's attitude toward obscenity was in an embryonic stage. In *Roth v. United States*[196] the purpose of the first amendment and its relation to obscenity were set forth as follows:

> The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . .
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> . . .
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> . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.[197]

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187. *Id.* at 161.
188. Orf v. State, 147 Miss. 160, 113 So. 202 (1927) (in banc).
189. 48 F.2d 128 (9th Cir.), *cert. denied*, 283 U.S. 863 (1931).
190. Radio Act of February 23, 1927, § 29, 44 Stat. 1172, *as amended*, 18 U.S.C. § 1464 (1964).
191. 48 F.2d at 134.
192. Gagliardo v. United States, 366 F.2d 720 (9th Cir. 1966).
193. West v. Campbell, No. 2814 Crim. (Cir. Ct. Carroll County Md., May 1, 1969), *aff'd sub nom.* State v. West, — Md. App. —, 263 A.2d 602 (Ct. Spec. App. 1970).
194. N.Y. Times, Oct. 14, 1937, at 29, col. 1.
195. Commonwealth v. Brown, 67 Pa. D. & C. 151 (C.P. Franklin County 1948).
196. 354 U.S. 476 (1957).
197. *Id.* at 484.

In the course of that opinion, the Court discussed the common origins of blasphemy and profanity laws.[198] Even before obscenity was recognized as a crime in England,[199] the colony of Massachusetts Bay had passed a law punishing

> whosoever shall be convicted of composing, writing, printing or publishing of [*sic*] any filthy, obscene, or profane song, pamphlet, libel or mock sermon, in imitation or in mimicking of preaching, or any other part of divine worship . . . .[200]

This statute was the ancestor of the state's obscenity law, whereas blasphemy was to be covered by the statute construed in the *Kneeland* case.[201] The two leading English obscenity cases, *Rex v. Curl*[202] and *Regina v. Hicklin*,[203] would almost certainly have been simple blasphemy cases had not the offending materials been directed at the Roman Catholic Church rather than the Church of England.

Although the Supreme Court noted their existence in passing in *Roth*, with no apparent disapproval,[204] blasphemy prosecutions, by their absence, have been given no substantial attention aside from the dictum in *Epperson*. The treatment of obscenity, on the other hand, has been refined considerably just in the period since *Roth*, where the issue had been stated as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[205] An important culmination of several lines of development occurred on the same day in 1966, when the Supreme Court decided *Memoirs v. Massachusetts*,[206] *Ginzburg v. United States*,[207] and *Mishkin v. New York*.[208]

The *Ginzburg* case set forth the important rule that "in close cases evidence of pandering may be probative with respect to the nature of the material in question . . . ."[209] This was not such a shocking or novel development as it seemed to many at the time. The conduct and intent of the purveyor

198. *Id.* at 483.

199. Rex v. Curl, 93 Eng. Rep. 849 (K.B. 1727), *overruling* The Queen v. Read, 88 Eng. Rep. 953 (Q.B. 1707).

200. Acts and Laws of the Province of Mass. Bay, ch. CV, § 8 (1712), in THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 399 (1814). *See also* Grant & Angoff, *Massachusetts and Censorship*, 10 B.U.L. REV. 36, 52 et seq. (1930).

201. Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206 (1838). *See* text accompanying notes 97-104 *supra*.

202. 93 Eng. Rep. 849 (K.B. 1727). The shorter report of this case at 94 Eng. Rep. 20 suggests that the indictment was in fact for blasphemy, or some more religious offense.

203. L.R. 3 Q.B. 360 (1868).

204. Roth v. United States, 354 U.S. 476, 482 (1957). *See also* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). *But see* Epperson v. Arkansas, 393 U.S. 97, 107-08 n.15 (1968) (text accompanying note 150 *supra*); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 529 (1952) (concurring opinion of Frankfurter, J.).

205. 354 U.S. at 489.

206. 383 U.S. 413 (1966).

207. 383 U.S. 463 (1966).

208. 383 U.S. 502 (1966).

209. 383 U.S. at 474.

is a logical factor in determining the criminality of his acts.[210] Despite its doubtful validity on the facts of *Ginzburg*, the rule is directed at the least socially useful kind of obscenity, that in which people's weaknesses for such material are exploited for commercial gain. On the other hand, the application of this rule to the facts in *Ginzburg* itself indicates the possible abuses of a rule by which any reference to the sexual content of material in an advertisement, or any sale of the material, can be construed as pandering or commercial exploitation.[211] The *Ginzburg* rule, as stated, was meant to apply only "in close cases."[212] Most obscenity was to be defined by the substantive rules set out in *Memoirs v. Massachusetts:*

> Under [the *Roth*] definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[213]

Since 1966, with the most notable exception being *Ginsberg v. New York*,[214] upholding a broader definition of material whose sale to children was forbidden, almost no obscenity convictions have survived Supreme Court scrutiny.[215] The Court has been content in many cases to reverse per curiam, citing *Redrup v. New York*,[216] its most recent restatement of requirements for punishing obscenity. In that case and the two others decided in the same opinion the Court, exonerating the materials in question, noted that none of the cases presented claims of special protection for children, invasion of privacy by blatant public display, or pandering.[217] The later reliance on *Redrup* suggests that these have in fact become affirmative requirements, and that satisfaction without more of the trifurcate *Memoirs* test may not necessarily defeat a first amendment claim.

Applying obscenity doctrines to blasphemy statutes presents some difficult problems. Assuming *arguendo* what Mr. Justice Stewart claims, that

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210. *See* Mishkin v. New York, 383 U.S. 502 (1966).

211. *See also* Landau v. Fording, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (Dist. Ct. App. 1966), *aff'd mem.*, 388 U.S. 456 (1967), where the lower court found pandering in the showing of a 16-millimeter film by Jean Genet on university campuses for a small admission fee.

212. 383 U.S. at 474.

213. *Id.* at 418.

214. 390 U.S. 629 (1968). *See* text accompanying notes 231-34 *infra.*

215. *But see* Landau v. Fording, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (Dist. Ct. App. 1966), *aff'd mem.*, 388 U.S. 456 (1967) (note 211 *supra*).

216. 386 U.S. 767 (1967). Two good examples of the approximately one dozen cases relying on *Redrup* are Central Magazine Sales, Ltd. v. United States, 389 U.S. 50, *rev'g* United States v. 392 Copies of a Magazine Entitled "Exclusive," 373 F.2d 633 (4th Cir. 1967); Potomac News Co. v. United States, 389 U.S. 47, *rev'g* United States v. 56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun," 373 F.2d 635 (4th Cir. 1967).

217. 386 U.S. at 769.

only "hard-core pornography" is constitutionally punishable,[218] the problem is to define analogous "hard-core blasphemy." The "patently offensive" branch of the test at first seems equally applicable to blasphemy, but if the "contemporary community" is as religiously diverse as the United States, its standards in this area may be even more difficult to ascertain than its sexual standards, and the Supreme Court has made it clear that the *national* community's standards must control.[219] In addition, of course, punishing that which is "patently offensive" only to members of certain religions arguably violates the neutrality required by the establishment clause.[220]

The "prurient interest" branch of the obscenity test, if taken to define the content of the forbidden material as sexual, is not easily translated into religious terms. The commercial exploitation of a "prurient interest" in ridiculing Protestant Christianity is hardly a thriving industry or even a prevalent social phenomenon.[221] Furthermore, one of the special evils of obscenity in the eyes of society and the Supreme Court, as revealed by the use of the word "prurient," is that it appeals to an "itching" or "longing,"[222] almost to the purely physical needs of the recipient. The evil is said to be heightened by the fact that hard-core pornography caters to fantasies, rather than to a rational or artistic appreciation of "erotic realism."[223] It is conceptually difficult to imagine similar irrational fantasies being exploited in the religious sphere.

The third branch of the Memoirs test, the requirement that the material be "utterly without redeeming social value,"[224] is usually used to exonerate material otherwise punishable under the first two tests, such as the book *Fanny Hill* itself.[225] In order to be neutral, this test presumably cannot be used to permit a court to measure the value of ideas expressed in the material; at a minimum, the attempt to portray any idea should suffice to protect it. This standard was used, for example, by the Court of Appeals for the Second

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218. Jacobellis v. Ohio, 378 U.S. 184 (1964) (concurring opinion). Mr. Justice Stewart added:

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .

Id. at 197.

219. *Id.* at 192-95 (opinion of Brennan, J.). *See also* Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488 (1962) (opinion of Harlan, J.).

220. *See* text accompanying notes 133-50 *supra.*

221. But see the concern for just such exploitation expressed in the House of Commons debates on the blasphemy laws in England. *E.g.*, 234 PARL. DEB., H.C. (5th ser.) 527 (1930).

222. Roth v. United States, 354 U.S. 476, 487 n.20 (1957), *citing* WEBSTER'S NEW INTERNATIONAL DICTIONARY (Unabridged 2d ed. 1949).

223. E. & P. KRONHAUSEN, PORNOGRAPHY AND THE LAW 226 *passim* (rev. ed. 1964). *See also* Finnis, *"Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 231 et seq. (1967); Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7, 71-73.

224. 383 U.S. at 418.

225. *See id.* at 418-19.

Circuit in overturning a jury verdict that the movie "I Am Curious (Yellow)" was obscene:

> Whatever weight we may attach to the opinions of the "experts" who testified to the picture's social importance, and whether or not we ourselves consider the ideas of the picture particularly interesting or the production artistically successful, it is quite certain that "I Am Curious" does present ideas and does strive to present these ideas artistically.[226]

The very fact that this type of distinction was at least verbally attempted, in the blasphemy area,[227] indicates that this test may at least be conceptually appropriate in applying the obscenity standards to blasphemy. This "social value" test is a direct outgrowth of a broadly stated first amendment protection. For example, in holding that topless dancing was entitled to first amendment protection as a medium of expression, the Supreme Court of California first advanced the rationale that since the distinction between those ideas necessary to make political decisions, that is, those ideas which the first amendment is designed to protect, and other forms of communication was so elusive, "courts must . . . cast a wide net over all forms of communication in order to protect that which is of potential political relevance."[228] The court proceeded, however, to announce a broader principle which in effect has pervaded this area of the law:

> [T]he life of the imagination and intellect is of comparable import to the preservation of the political process; the First Amendment reaches beyond protection of citizen participation in, and ultimate control over, governmental affairs and protects in addition the interest in free interchange of ideas and impressions for their own sake, for whatever benefit the individual may gain. . . . In any event, the apparent lack of relevance of the dance here at issue to any political decisions is immaterial; under either rationale the dance potentially merits First Amendment protection. Thus the First Amendment cannot be constricted into a straitjacket of protection for political expression alone. Its embrace extends to all forms of communication, including the highest: the work of art.[229]

The application of such a standard to blasphemy would perhaps have the same effect as it has had on obscenity. The area of unprotected speech would be narrowed until, perhaps, it included only epithets. Alternatively, virtually any material would be permissible unless the manner of distribution were such as to violate the considerations set forth in *Redrup v. New York*.[230]

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226. United States v. A Motion Picture Film Entitled "I Am Curious-Yellow," 404 F.2d 196, 199-200 (2d Cir. 1968).

227. *See* text accompanying notes 34-49, 91, 101-04, 116 *supra*.

228. *In re* Giannini, 69 Cal. 2d 563, 569-70 n.3, 446 P.2d 535, 540 n.3, 72 Cal. Rptr. 655, 660 n.3 (1968), *cert. denied*, 395 U.S. 910 (1969).

229. *Id.*

230. 386 U.S. 767 (1967). *See* text accompanying note 217 *supra*. For a particularly forthright statement by a recent court see Karalexis v. Byrne, 306 F. Supp. 1363 (D.

The special problem of concern for children may also have some relevance to blasphemy. The Supreme Court's *Ginsberg* decision allowed the state to punish the sale to children of a considerably wider range of sexual matter than could be kept from adults.[231] The rationale for this "variable obscenity"[232] standard lies both in the concern for the possible harm such materials may do to the young, and the desire to support parental preferences regarding their children's upbringing.[233] The first is speculative, however, and permissible only because the state need not prove "clear and present danger" in the area of obscenity anyway; this fact and the state concern for child welfare generally weighed heavily in favor of the state's finding of possible harm.[234] Neither justification is as persuasive for blasphemy, especially in light of the school prayer decision,[235] but this is more because allowance for state presumptions or parental preferences in this area may be an explicit violation of the establishment clause.[236]

Although the black-letter law of obscenity is, on the whole, difficult to apply to blasphemy, the underlying policies may suggest a solution. Despite claims that pornography incites people to anti-social acts, a concern for this problem is difficult to find in the law of obscenity; if the Supreme Court had thought it valid, it probably would not have rejected the "clear and present danger" test in *Roth*.[237] The recent decision in *Stanley v. Georgia*,[238] upholding an unlimited right to possess obscene material in the privacy of one's home, suggests that society's interest in protecting the holder or itself is minimal, since private possession of more harmful materials can certainly be punished. The true rationale for allowing any restrictions on obscenity must simply be that it is highly offensive to the average member of the community. Thus when there is no countervailing claim of "redeeming social importance," a prerequisite for the speech to be constitutionally protected, the community may suppress the offending matter.[239] One might go even further and suggest

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Mass.) (three-judge court), *motion for stay of temporary injunction granted*, 396 U.S. 976 (1969), *prob. juris. noted* 38 U.S.L.W. (U.S. March 23, 1970) (No. 1149). *See also* C. REMBAR, THE END OF OBSCENITY *passim* (1968).

231. Ginsberg v. New York, 390 U.S. 629 (1968). *But see* People v. Bookcase, Inc., 14 N.Y.2d 409, 201 N.E.2d 14, 252 N.Y.S.2d 433 (1964), which struck down the predecessor of the statute upheld in *Ginsberg* for vagueness and overbreadth. On the other hand, an almost identical statute was upheld in Rhode Island in State v. Settle, 90 R.I. 195, 156 A.2d 921 (1959).

The recognition that the police power could override first amendment claims regarding minors is exemplified by Prince v. Massachusetts, 321 U.S. 158 (1944). On the other hand, that state interest does not justify any infringement on adult rights. Butler v. Michigan, 352 U.S. 380 (1953).

232. *See* Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 85, *passim* (1960).

233. Ginsberg v. New York, 390 U.S. 629, 639-43 (1968).

234. *Id.* at 641.

235. School Dist. v. Schempp, 374 U.S. 203 (1963).

236. *See generally* text accompanying notes 133-50 *supra*.

237. Roth v. United States, 354 U.S. 476, 486-87 (1957).

238. 394 U.S. 557 (1969).

239. *See* Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 397 (1963).

that the current law effectively regulates only the manner of distribution of obscenity, not its content,[240] just as even highly protected political speech may be reasonably regulated as to time, place, and volume.[241]

From all this it might be possible to hypothesize blasphemous material whose intent is solely to offend and which has no redeeming social importance —material which will arouse an irrational if not physical disgust in the average recipient. The parallel with obscenity's ostensibly physical effect is far from perfect, but some such criterion is necessary to prevent the suppression of ideas or artistic or political endeavor. But there are additional constitutional problems involved in the blasphemy area which are not present when dealing with obscenity. Initially, of course, the special problems of the establishment clause militate against protection of the "average" person's religious sensibilities.[242] Even beyond this, however, a brief analogy to the law of libel indicates that blasphemous language may, by its very nature, be entitled to even more constitutional protection than has been given to obscenity. In *New York Times Co. v. Sullivan*,[243] the Supreme Court protected even falsehood if uttered in criticism of public officials and without actual malice. Though the malice requirement is reminiscent of a similar, at least verbal, limitation in the earlier law of blasphemy,[244] the standards for libel are obviously unsuitable in the blasphemy area; the very notion of "truth as a defense," for example, indicates that those rules have evolved to suit the very different needs of balancing the public's right to certain types of knowledge against the interests of a particular individual in maintaining his good reputation. What the *Times* case does add here, however, is the acknowledgment that within an increasingly expanding sphere of public interest,[245] additional constitutional protection is necessary even for a genus of speech which had previously been thought to be outside the traditional political realm. Precisely because of religion's intimate historical ties with the social order, which were once seen as a justification for protecting it, it must now be open to a broad range of "robust" criticism. If it is constitutionally permissible to cajole people out of their religious beliefs, it should be permissible to use ridicule or other rhetorical tactics to the same end, or even merely to expose to third persons the alleged fallacies of such belief. Certainly the physical disruption of another's religious worship, because it infringes the free exercise of religion, should be constitutionally punishable,[246] and the narrow area of

240. *See* text accompanying notes 217, 230 *supra*.

241. *E.g.*, Adderley v. Florida, 385 U.S. 39 (1966); Kovacs v. Cooper, 336 U.S. 77 (1949) (loudspeakers); Cox v. New Hampshire, 312 U.S. 569 (1941).

242. *See* text accompanying notes 133-50 *supra*; Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 & n.19 (1952) (dictum).

243. 376 U.S. 254 (1964).

244. *See* notes 41, 67, 81, 86, 91 *supra* and accompanying text.

245. *See also* Time, Inc. v. Hill, 385 U.S. 374 (1967); Note, *Libel and the Corporate Plaintiff*, 69 COLUM. L. REV. 1496 (1969).

246. MODEL PENAL CODE §§ 250.3-.4 *and* Comments (Tent. Draft No. 13, 1961). *See also* Gannon v. Action, 303 F. Supp. 1240 (E.D. Mo. 1969): plaintiff church

pure epithet has little claim to protection.[247] Beyond these situations, however, blasphemy must be considerably more protected than obscenity, and regulated by the standards for political speech.

Although blasphemy is probably entitled to full first amendment protection when it is used to criticize religious beliefs or sensibilities, it might be subject to punishment, like all other speech, when used merely as an epithet or as "fighting words." Nevertheless, the possibility that blasphemy might in some cases be punishable in no way supports the validity of broadly drawn anti-blasphemy legislation. Even when political speech may in fact be punishable, the state may not punish it under a statute that violates the due process prohibitions against vagueness and overbreadth.[248] Such a statute may be challenged on its face, despite the argument that a petitioner effectively lacks standing to challenge the statute if his acts are constitutionally punishable, and that therefore his challenge to the breadth of the statute is really only an attempt to litigate the interests of others. The leading case is *Thornhill v. Alabama*,[249] which held that peaceful picketing in a labor dispute was constitutionally protected expression, and that a statute clearly punishing such picketing was therefore void on its face, regardless of the particular facts involved. In the Supreme Court's words,

> [a]n accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him.[250]

Implicit in the above quotation, and explicit elsewhere in the *Thornhill* opinion, is a two-fold basis for the holding. One theory is that petitioner is clearly litigating his own rights: conviction under an overbroad statute is like conviction for a crime not at all charged in the indictment, "a sheer denial of due process,"[251] no matter how guilty defendant is of *some* crime. The other is derived by analogy from licensing statutes, for which the Supreme Court had already evidenced extreme distaste, holding that prior restraints or permit

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congregation was held entitled to a preliminary injunction against disruption by several black liberation organizations. The cause of action, and federal jurisdiction, were based on a violation of the *congregation's* civil rights under the Civil Rights Acts, 42 U.S.C. §§ 1981-83, 1985(3) (1964).

247. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

248. *See generally* Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

249. 310 U.S. 88 (1940).

250. *Id.* at 98. The face of a statute includes the highest state court's construction of it. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942). Amsterdam, *supra* note 248, at 73-74, points out that this may negate the argument that a statute should provide fair warning of proscribed conduct if, as in *Chaplinsky*, the saving construction of the statute occurs in the instant case. The Supreme Court seems to have recognized this problem in Shuttlesworth v. Birmingham, 394 U.S. 147, 155 (1969).

251. 310 U.S. at 96, *quoting* De Jonge v. Oregon, 299 U.S. 353, 362 (1937).

requirements for various forms of expression were allowable only if the standards to be observed by the licensing authority were narrow and precise.[252] Like a vague or overbroad licensing statute, a vague or overbroad statute providing for punishment after the fact may effectively suppress constitutionally protected speech:

> The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.[253]

The Supreme Court is here articulating an embryonic "chilling effect" argument, an argument which later reached fruition in *Dombrowski v. Pfister*.[254]

Thornhill is actually an overbreadth case, since the terms of the statute involved were not the least bit vague. Under the overbreadth doctrine, a blasphemy statute would be void on its face if by its terms it punished constitutionally protected speech. It seems clear that, even if treated as obscenity, *most* blasphemy is so protected. And, even overlooking the establishment of religion question, most of the blasphemy statutes in existence today clearly encompass forms of political speech which are not constitutionally punishable.

It may be observed that many if not all blasphemy statutes are so vague as to be constitutionally deficient on that ground alone, without further inquiry. Vagueness can be challenged in the same way as overbreadth; it has the same fault of failure to give reasonable warning to actors, and it is dealt with in the same way. A vague statute, in often-quoted language, is one

> which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . .[255]

The precedents in this area are far from consistent. Such words as "unjust or unreasonable," for example, have sometimes been held too vague, and sometimes not.[256] If, as the leading commentator on vagueness suggests, "the concept of vagueness is an available instrument in the service of other more

252. Cox v. New Hampshire, 312 U.S. 569 (1941) (statute upheld). Overbroad licensing statutes were struck down in Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) (street parades and demonstrations); Kunz v. New York, 340 U.S. 290 (1951) (religious meetings in street); Niemotko v. Maryland, 340 U.S. 268 (1951) (religious meetings in park); Saia v. New York, 334 U.S. 558 (1948) (sound trucks); Cantwell v. Connecticut, 310 U.S. 296 (1940) (soliciting for religious organizations); Hague v. CIO, 307 U.S. 496 (1939) (indoor meetings); Lovell v. Griffin, 303 U.S. 444 (1938) (leaflets).

253. 310 U.S. at 97-98 (footnote omitted).

254. 380 U.S. 479 (1965). *See generally* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969). The thrust of *Dombrowski* is that in certain circumstances a federal district court may not constitutionally *abstain* from granting declaratory and injunctive relief against a statute.

255. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

256. Amsterdam, *supra* note 248, at 69.

determinative judicially felt needs and pressures,"[257] the doctrine can be applied to blasphemy only in the context of substantive constitutional law. Historically, blasphemy would seem to be more definite than "obscenity," which is not unconstitutionally vague.[258] On the other hand, in the context of speech as it is actually used today, a reasonable man could hardly be expected to guide his conduct by the standards of a traditional blasphemy statute.

Whether a statute is vague or overbroad may thus be ascertained only after examining the substantive rules of law that govern the particular area. There seems no doubt that a general blasphemy statute incurs constitutional difficulty because of its all-encompassing language. The establishment clause problems are evident,[259] and the free speech questions may be just as pronounced where no state interest in protecting order is either discernible or supportable. Even assuming, however, that a narrowly drawn blasphemy statute, with the specific objective of maintaining order, could be drafted, the substantive law regarding the punishment of political speech would require such a statute to be so limited in its language and application that it could no longer be regarded as one protecting the community from blasphemy. Superimposed upon the "clear and present danger" test for such speech has been the requirement of specific intent to bring about a disorderly situation.[260] Furthermore, fear of any resulting disorder may not suffice; the mere fact that the speaker's words anger his hearers is not, and logically should not be, sufficient to justify his punishment. In so holding, the Supreme Court said in *Terminiello v. Chicago*:[261]

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.[262]

Even *Beauharnais v. Illinois*,[263] which upheld a "group libel" statute protecting the racial, ethnic, and religious sensibilities of minority groups,

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257. *Id.* at 75.

258. Roth v. United States, 354 U.S. 476, 491-92 (1957). As in *Thornhill*, the fact that blasphemy may provide an ascertainable standard does not cure its *overbreadth*.

259. *See* text accompanying notes 124-50 *supra*.

260. Brandenburg v. Ohio, 395 U.S. 444 (1969). *See also* Scales v. United States 367 U.S. 203, 220, 227-30 (1961); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494, 499 (1951).

261. 337 U.S. 1 (1949).

262. *Id.* at 4 (citations omitted).

263. 343 U.S. 250 (1952).

and which stands out as one of the more forceful, if not sole, Supreme Court statements on such protection, carefully and specifically noted the existence of severe racial tension in Illinois, and considered that an important justification for a broad and prophylactic statute.[264] Furthermore, *New York Times Co. v. Sullivan*[265] casts doubt even on this justification in the specific area of libel. Lastly, in *Beauharnais*, although white supremacist literature was being distributed in the street, there was no showing of *imminent* disorder, as there was in the other strong case upholding a conviction in similar circumstances, *Feiner v. New York*.[266] Feiner was convicted of disorderly conduct only after disorder by his audience seemed imminent as a result of his speech, and after being asked to stop by policemen, although there was no finding of specific intent. If the failure so to find renders the *Feiner* result weak today, as *Gregory v. Chicago*[267] indicates, then *Beauharnais* is a fortiori invalid. *Gregory* involved a march where disorder was threatened, defendants were asked to disperse, and were arrested on their refusal. The Supreme Court reversed their convictions. The only possible reconciliation of this case with *Feiner* is that *Gregory*, like *Terminiello*, protects free speech when a *hostile* audience disagrees with the speaker, absent specific intent to provoke it to violence,[268] and that such a finding of specific intent can be inferred in *Feiner* from the speaker's refusal to stop after being warned by the police that disorder threatened. Absent such an inference, even *Feiner*, with its element of imminent disorder, may have been overruled *sub silentio*. In fact, the Supreme Court has more often reiterated the *Terminiello* philosophy that constitutionally protected activity may not be suppressed merely because other people threaten disorder. Justice Black's dissent in *Feiner* suggests that society's first obligation is to protect the speaker faced with mob violence.[269] In *Cooper v. Aaron*,[270] the Court upheld the right of blacks to attend Central High School in Little Rock, Arkansas despite possible rioting by whites. Quoting *Buchanan v. Warley*,[271] which rejected the threat-of-violence argument in striking down an ordinance forbidding blacks to purchase homes in white neighborhoods, the Court said:

> [I]mportant as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.[272]

264. *Id.* at 258-61.
265. 376 U.S. 254 (1964).
266. 340 U.S. 315 (1951).
267. 394 U.S. 111 (1969).
268. *See* cases cited note 260 *supra*. *Brandenburg v. Ohio* indicates that the specific intent requirements developed in *Scales*, *Yates*, and *Dennis*, cases which involved subversive organizations, apply also to the more immediate, and perhaps more dangerous, area of public speeches advocating lawless action.
269. 340 U.S. at 326-27.
270. 358 U.S. 1 (1958).
271. 245 U.S. 60 (1917).
272. 358 U.S. at 16, *quoting* 245 U.S. at 81.

In *Wright v. Georgia*,[273] a group of blacks were playing basketball in a city park. A policeman ordered them to leave on the grounds that they might incite whites to violence, although there was little evidence of an immediate threat. Petitioners were arrested for breach of the peace on failure to obey the policeman's order. The Supreme Court reversed, stating that "the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present."[274] These forceful, unequivocal statements would seem to apply to purer first amendment situations a fortiori, and in this light *Feiner* appears even more as an aberration.

The Court in *Terminiello* indicated that conviction for disorderly conduct is not justified by an insubstantial amount of possible disruption by the audience, and the same is true of disruption by the speaker himself. The leading recent case is *Edwards v. South Carolina*,[275] a direct descendant of *Terminiello*. A peaceful march on the South Carolina State House grounds engendered singing, shouting, foot-stamping, and hand-clapping when the demonstrators were ordered to leave. The Supreme Court followed the *Terminiello* reasoning and said that the breadth of South Carolina's breach of peace rule, which spoke in terms of protecting the "tranquility of the public," allowed punishment merely for arousing anger, and a conviction under it was therefore under an overbroad rule. Similar results were reached in a case now pending before the Supreme Court, *University Committee to End the War in Vietnam v. Gunn*,[276] in which declaratory and injunctive relief was granted against an overbroad disorderly conduct statute. The particular statutory language which might have included the plaintiffs within its scope proscribed the use of "loud and vociferous . . . language . . . in a manner calculated to disturb."[277]

The Supreme Court has often held particular kinds of words unprotected by the first amendment. Thus *Chaplinsky v. New Hampshire*[278] allowed conviction for "fighting words" where no disorder was threatened (except, according to the Court, in the abstract as a natural result of such words). *Cantwell v. Connecticut*,[279] however, had earlier reversed a breach of peace conviction where violent reaction was imminent, because the language, though highly offensive to Roman Catholics, was not abusive. The Court said:

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273. 373 U.S. 284 (1963).

274. *Id.* at 293, *citing* Taylor v. Louisiana, 370 U.S. 154 (1962); Garner v. Louisiana, 368 U.S. 157 (1961); Buchanan v. Warley, 245 U.S. 60 (1917).

275. 372 U.S. 229 (1963).

276. 289 F. Supp. 469 (W.D. Tex. 1968) (three-judge court), *prob. juris. noted*, 393 U.S. 819, *restored to calendar for reargument*, 395 U.S. 956 (1969). *Accord*, Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1967) (three-judge court). *See also* Kinoy v. District of Columbia, 400 F.2d 761 (D.C. Cir. 1968).

277. *See also* Phillips v. Folcroft, 305 F. Supp. 766, 770 (E.D. Pa. 1969) ("loud and/or unnecessary noises"); Landry v. Daley, 280 F. Supp. 968, 970 (N.D. Ill. 1968) ("improper noise, . . . disturbance").

278. 315 U.S. 568 (1942).

279. 310 U.S. 296 (1940).

> One may . . . be guilty of the offense if he commits acts or makes statements likely to provoke violence and disturbance of good order . . . . Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . . .[280]

Possible mitigation of *Chaplinsky* and *Cantwell*, however, is indicated by *Williams v. District of Columbia*,[281] which reversed a conviction for swearing at a policeman on a crowded street. The Court of Appeals for the District of Columbia Circuit held that even epithets could not be constitutionally punished unless, under the *circumstances*, they were likely to cause a breach of the peace.

Problems arise in borderline situations, where obscenities or other epithets are intermingled with political speech. *State v. Ceci*,[282] a recent Delaware case, held that the use of the slogan "Up Against the Wall Motherfucker" in large print on a leaflet as an attention-getting device was not entitled to constitutional protection, even though followed by written matter of a political nature. The court relied largely on the rule that obscenity is constitutionally punishable without any showing of danger to society, and noted that the leaflets were distributed in such a way that people who were in fact offended by such language could not avoid seeing it. Essential to the decision, however, was the finding that the prominently-printed obscenity was severable from the rest of the leaflet; the court admitted that the word "motherfucker" in the body of the material could not support conviction. A similar finding of special circumstance was made in a Maryland case, *Lynch v. State*,[283] involving a right-wing speaker. Defendants were convicted of inciting to riot and disorderly conduct in urging a crowd of whites to kill blacks, where some instances of violence against black onlookers resulted. However, not only did the court find specific intent to arouse such violence, despite defendants' claim to the contrary; it also advanced the consideration that the use of anti-Negro and anti-Semitic language was not entitled to much protection.[284]

The Supreme Court's view on epithets and personal abuse, quoted above from *Cantwell*, is at first glance reminiscent of the old blasphemy cases. The trend in this area of the law, however, is to recognize that error should be on the side of protection in weighing the presence of epithets or the threat of violence against freedom of speech. Neutral principles dictate that in the area

280. *Id.* at 309-10. *See also* Kunz v. New York, 340 U.S. 290 (1951), where such offensiveness on previous occasions was held not to justify prior restraint of the speaker.

281. 419 F.2d 638 (D.C. Cir. 1969) (en banc), *rev'g* 227 A.2d 60 (D.C. Ct. App. 1967).

282. 255 A.2d 700 (Super. Ct. Del. 1969).

283. 2 Md. App. 546, 236 A.2d 45 (Ct. Spec. App. 1967). *See also* Rockwell v. District of Columbia, 172 A.2d 549 (D.C. Ct. App. 1961).

284. *But cf.* Brandenburg v. Ohio, 395 U.S. 444 (1969), holding that such language, at a Ku Klux Klan meeting, could not be punished without a showing of specific intent to cause violence.

of epithets in particular, where the content is being used to determine protectibility, the law must allow for considerable variety in styles and modes of expression. The first amendment should not distinguish between the eloquence of a Daniel Webster and the earthier phraseology that characterizes much political speech today. The national interest in robust debate on public issues may be furthered as much by one as by the other. As early as 1930, speakers in Parliament recognized that blasphemy laws could be used to draw precisely this undesirable class and educational distinction.[285] More complete analysis of the Court's general views in this area, supported even by the otherwise questionable *Feiner* case, shows that the defendant's words must threaten a substantial, actual, and intended danger.[286] This is the point at which words become "brigaded with action"[287] and gradually relinquish their first amendment claims. The focus on the speaker's conduct, rather than the content of his speech, is manifest in statutes which can legitimately be characterized as neutral traffic regulations, which have long been upheld, subject to changing circumstances. Thus in *Kovacs v. Cooper*[288] the Supreme Court found that, under a narrowly drawn statute, the use of sound trucks could be prohibited or licensed.[289] In *Adderley v. Florida*,[290] the Court held that the grounds surrounding a jail were not appropriate for even peaceful picketing, and that the state could thus prevent otherwise protected expression from occurring there. To similar effect is *Cox v. Louisiana II*,[291] upholding a statute which forbade picketing in or near a courthouse on the grounds that the *conduct* involved infringed "a substantial state interest in protecting the judicial process"[292] which justified the curtailment of free expression. Earlier, in *Cox v. New Hampshire*,[293] the Court upheld a parade permit requirement where the standards for granting permits were definite and drawn narrowly so as to protect only against disruption to traffic on public ways.[294]

In this context, the concept of blasphemy becomes almost meaningless. Perhaps, if there is anything left of the *Cantwell* dictum,[295] the state could punish deliberate harassment of the religiously sensitive by means of epithets

285. 234 PARL. DEB., H.C. (5th ser.) 499, 535, 557 (1930).

286. *See* Terminiello v. Chicago, 337 U.S. 1 (1949); cases cited note 260 *supra.*

287. Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (concurring opinion of Douglas, J.); Speiser v. Randall, 357 U.S. 513, 536 (1958) (concurring opinion of Douglas, J.). *See generally The Legitimate Scope of Police Discretion to Restrict Ordinary Public Activity—Disorderly Conduct*, 4 HARV. CIV. RIGHTS-CIV. LIB. REV. 311 (1969).

288. 336 U.S. 77 (1949).

289. *But see* Phillips v. Darby, 305 F. Supp. 763 (E.D. Pa. 1969), holding that since some uses of sound trucks are innocuous even their absolute prohibition is unconstitutionally overbroad.

290. 385 U.S. 39 (1966).

291. 379 U.S. 559 (1965).

292. *Id.* at 564.

293. 312 U.S. 569 (1941).

294. *See also* Cox v. Louisiana I, 379 U.S. 536, Pt. III (1965), upholding the face of a statute forbidding obstruction of streets, though reversing convictions because of discriminatory enforcement.

295. *See* text accompanying note 280 *supra.*

unmixed with any attempt at communication. And those who meet peacefully for either religious or secular purposes are entitled to protection against interruption under a claim of free speech.[296] Apart from such narrowly drawn situations, the state may not, it seems, protect religious interests contrary to another's first amendment claim unless rather substantial concerns of society at large are threatened. The blasphemy statute that would emerge unscathed from a constitutional attack under the first amendment would thus not be a blasphemy statute at all; if anything it would merely be a narrowly drawn regulation of speech operative only where imminent danger is threatened and specific intent is found and where the language punished is defined no longer in religious but in neutral, secular terms.

CONCLUSION

A statute threatening fundamental freedoms should not be ignored because it appears to be a dead letter.[297] Blasphemy laws are one of the last remnants of an established church, and in protecting the religious from verbal affront they significantly curtail the freedom of expression of others. The state is lately being asked to exert its power toward the goal of improving the environment, and offensive expression undoubtedly worsens the environment for many. But if ideas were as amenable to objective valuation as physical pollution, there would be no need for the first amendment. One of the most universal human needs, which any government must take account of, is the need to communicate ideas, even if wrong, and the first amendment assumes that their free interchange helps insure orderly political change. Religion has been a fertile source of ideas which have both strengthened and challenged existing orders; the policy of the first amendment requires that it be the subject of vigorous debate.[298] The Christian's interest in being free from the psychic attack caused by insult to his deeply held beliefs[299] is, in light of the establishment clause, even less than that of the super-patriot; in any event, neither can be given more than the narrowest protection without infringing on the more vital national interests represented by the first amendment.

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296. *See* note 246 *supra.*
297. *Cf.* Poe v. Ullman, 367 U.S. 497 (1961).
298. *Cf.* Lusky, *supra* note 173, at 19 n.50.
299. *Cf.* Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963).